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# A TREATISE

## OF THE

### EVIDENCE OF SUCCESSION.

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#### CHAP. IV.

##### OF THE PROOF OF MARRIAGE.—(CONTINUED.)

In the Ecclesiastical Courts the declarations of a deceased clergy man as to the time when he had solemnized a certain marriage were received,<sup>(a)</sup> but as such declarations of the fact of marriage have since been held inadmissible<sup>(b)</sup> and there is no \*reason for [ \*260 ] any distinction in favour of the time, this authority cannot be relied upon.

The conduct of parties and all other evidence available in proof of the fact of marriage may also be useful in establishing the time. For the period of the first occurrence of facts indicative of a subsisting marriage will supply an inference of the time when the married state commenced. With this view evidence was gone into in the Berkeley Peerage case as to the time when the Countess was first called Lady Berkeley by the servants, and when her linen was first marked with the initials M. B. and a coronet.<sup>(c)</sup>

From the parents' treatment of a child as legitimate there arises a presumption (of course open to rebuttal,) not only that the parents were married but also that their marriage was anterior to the child's birth. Where the legitimacy of a daughter was impeached on the ground of her birth before her parents' marriage, and she proved their treatment and acknowledgment of her as legitimate, and that her father bequeathed the residue of his property to her by the description of his daughter, it was held by the Ecclesiastical Court, that it lay with the other party to shew her illegitimacy by proving the time of her birth, and of her parents' marriage subsequent to it.<sup>(d)</sup>

Of marriage, as of the species of facts already discussed, the requisite proof is affected by the occasion and subject of claim. In ejectment it has been seen that reputation will suffice even though better evidence be attainable. But in equity, though marriage is proveable

(a) *Robins v. Wolseley*, 2 Call. tem. Lee, 491. Ibid. 35.

(b) *Berkeley Earldom*, ante, p. 246.

(c) *Min. Ev.* 1799, p. 22. *Min. Ey.* 1811, *passim*.

(d) *Lady Mayo v. Brown*, 2 Cas. tem. Lee, 391.



by the same evidence as at law, a greater strictness of proof may in some cases be required by the different nature of the property, and the greater difficulty of retracing an erroneous step. And this observation has still greater force in claims of peerage. If the evidence in equity be conflicting, a jury are the proper judges of the fact of marriage; (e) but their verdict, on this as on other questions, is merely to inform the Court. Upon a question of legitimacy, the son produced [ \*261 ] witnesses who swore to a \*marriage in fact between his parents, and he obtained a verdict. On a second trial he declined to produce those witnesses, and rested solely upon a reputation of the marriage. Although the verdict was again in his favour, this was deemed insufficient to satisfy the conscience of a Court of Equity. (f)

In the Accountant-General office marriage might be proved by affidavit only; but Lord Eldon did not approve this laxity of practice. (g) And in the Master's office, and in application by petition or otherwise to the Court, the proper proof is by an examined extract from the register and an affidavit of identity.

The conveyancer is not easily satisfied with any evidence of marriage short of an examined copy of the register and evidence of identity; and, undoubtedly, if this proof is wanting, its absence ought to be satisfactorily accounted for, and its place well supplied. For a purchaser is entitled to require higher evidence of marriage than that which would be barely sufficient to obtain a verdict. There are many cases in which the jury will collect the fact of legitimacy from circumstances which might be attended with so much reasonable doubt that a Court of Equity would not compel a purchaser to take the title merely because there was such a verdict. The Court will weigh whether the doubt is so reasonable and fair that the property is left in his hands not marketable. (h)

But an objection grounded on the want of the register may be overcome. Where a defect in the proof of a party's legitimacy was objected to a title, and it appeared that the parents were living together as man and wife before Lord Hardwicke's Act, and that the mother was buried in 1781, and described in the register as the father's widow, but no register of the marriage could be found, and illegitimacy was sought to be inferred from some inaccuracy in a deed and particularity of the son's description in a will, Lord Eldon thought the inference from the circumstances could not be stated to a jury as fairly questionable, and therefore held the objection invalid. (i)

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[ \*262 ] \*SECTION II.—OF EVIDENCE RESPECTING THE VALIDITY OF MARRIAGE.

BESIDES the presumption of the fact of marriage from circumstances, there is a presumption from the fact, however proved, that the mode or form of it was such as to render the marriage valid. *Omnia pre-*

(e) See *Revel v. Fox*, 2 Ves. sen. 270.

(f) *Sherborne v. Naper*, 2 Ridgw. P. C. 234.

(g) *Clayton v. Gresham*, 10 Ves. 266.

(h) Per *Ld. Eldon*, 8 Ves. 428.

(i) *Lord Braybrooke v. Inskip*, 8 Ves. 417.

*seu rite et solemniter acta* : parties marrying must be presumed to have done so in a manner conformable to law; and the presumption is founded in reason, for when they have determined upon a fact of marriage, it is the interest of both or one that the contract should be binding. (j)

This presumption was relied on by Sir John Nicholl in the case of *Steadman v. Powell*. (k) The parties, who were Protestants, were both in the service of the Duke of Rutland, whilst he was Lord Lieutenant of Ireland. In 1786, the woman becoming pregnant, as it was rumoured, by the defendant, it was intimated to him that his marriage with her was necessary to the tenure of their places. A fact of marriage was then asserted to have taken place, and an instrument purporting to be a certificate of the marriage was shewn to the Duke and Duchess of Rutland, who being thereby satisfied that the parties were really married, suffered them to continue in their situations. They subsequently treated each other, and were considered by their friends man and wife, and the issue were baptized as lawful children. The woman, however had, before her death, declared that she had been married to the defendant in a way she conceived to be illegal, meaning by a Catholic priest, and there was some other evidence to this effect.

Sir John Nicholl relied upon the facility with which [ \*263 ] marriages could be contracted in Ireland, upon the improbability that a Popish priest would have married these parties in the face of a sentence of capital felony, (l) upon the presumption in favour of the validity of a marriage the fact of which was once proved, and considering the marriage sufficiently established, refused probate of the woman's will, and granted administration to her husband.

And even if it be shewn that a particular marriage was void, yet if the parties continued to cohabit as man and wife, a subsequent legal marriage may be presumed. (m)

But though a fact of marriage be clearly established it may be met and rendered unavailable either by evidence of a sentence of nullity pronounced by a Spiritual Court of competent jurisdiction, or by proof of a cause of nullity of marriage cognizable in the Temporal Courts. It is important to observe that few causes of nullity are matters so intelligible or notorious as the fact of marriage in general is, and that therefore reputation is for the most part in favour even of void marriages.

The causes of nullity afterwards enumerated, which shew the marriage to have been absolutely void, are cognizable in the Temporal Courts: but a voidable marriage cannot be there impeached except by the sentence of the Spiritual Court divorcing the parties *a vinculo*. If, however, there be such a sentence unrepealed, the issue, whether born before or after it, are illegitimate. (n) The sentence of the Spiritual Court pronouncing the marriage null by reason of an impediment which rendered it void and not merely voidable is also evidence in the

(j) 1 Add. 66, (2 E. Ecc. R.)

(k) 1 Add. 58, (2 E. Ecc. R.)

(l) 12 Geo. 1, c. 3, s. 1, (Irish.) But see 17 & 18 Geo. 3, c. 9, s. 1.

(m) *Wilkinson v. Payne*, 4 T. R. 468.

(n) 1 Roll. Ab. 359.

Temporal Courts, although the cause of nullity was one which they might have entertained independently of such sentence.(o)

The sentence of the Spiritual Court, either in affirmance or in avoidance of a marriage, is merely declaratory. Because in order to warrant a divorce *a vinculo*, the cause of nullity must have existed at the [ \*264 ] time of the marriage; the Spiritual Courts being \*without power to annul a marriage for adultery or any other cause arising subsequently to the contract. This was solemnly decided in Foljambe's case in the 44th of Elizabeth, where after a divorce for adultery on the wife's part the husband married again during her life, and his second marriage was declared to be void.(p) Sentences of divorce *a mensâ et thoro* which are only pronounced for adultery or cruelty have not therefore any effect upon the validity of the marriage, nor except so far as they afford a presumption of non-access,(q) upon the legitimacy of the issue.(r)

Where in civil causes the Temporal Courts find the question of marriage directly determined by the Ecclesiastical Courts they receive the sentence though not as a plea yet as a proof of the fact: it being an authority accredited in a judicial proceeding by a Court of competent jurisdiction.(s)

Hence a sentence of nullity and a sentence in affirmance of a marriage have been received as conclusive evidence on a question of legitimacy arising incidentally upon a claim to a real estate.(t) A sentence in a cause of jactitation has also been received upon a title in ejectment as evidence against a marriage,(u) and in like manner in personal actions immediately founded on a supposed marriage.(v)

It was said by De Grey, C. J., that in all these cases the parties [ \*265 ] \*to the suits, or at least the parties against whom the evidence was received were parties to the sentence, and had acquiesced under it, or claimed under those who were parties and had acquiesced.(w) But it has been thought that this observation had reference to cases where the proceeding in the Ecclesiastical Court had not been a proceeding *in rem*, and where the question of marriage had been only incidentally determined: and that where the object of the suit has been directly to deprive a person of the legal character of husband or wife, by virtue of the exclusive jurisdiction of the Ecclesiastical Court, the sentence of nullity of marriage or of divorce, in like manner as probates and letters of administration, have the effect of estab-

(o) Cro. Eliz. 857. Gibs. Cod. 446. (p) 3 Inst. 88. 3 Salk. 138. (q) Post, c. 5.

(r) By the ancient English law it would appear that divorces *a vinculo* were allowed for adultery; and by the *Reformatio Legum* it was proposed that divorces *a mensâ et thoro* should be abolished, and that divorces *a vinculo* should be allowed for adultery, desertion, cruelty, &c., that the innocent party should be allowed to marry again, and that the offending party should be punished by banishment or imprisonment. Gibs. Cod. 446. 536. Bishop Burnet's Hist. Reformation, p. 315. The first instance of a divorce by Act of Parliament was that of Lord De Roos in 1669. Only five of such acts passed before the accession of the House of Hanover, from which period they have rapidly increased. Between 1715 and 1775 there were sixty: from that date to 1800 seventy-four; and from 1800 to 1830 about ninety. See Bramwell's Table of Private Acts, and Dr. Phillimore's Speech in the House of Commons in 1830, on the Law of Divorce.

(s) Per De Grey, C. J. 20 How. St. Tr. 540.

(t) Bunting v. Lepingwell, 4 Rep. 29 a. Moor, 169, S. C. Kenne's case, 7 Rep. 41 b. Cro. Jac. 186.

(u) Jones v. Bow, Carth. 225.

(v) Hatfield v. Hatfield, 2 Strange, 691. 1 Salk. 290.

(w) 20 How. St. Tr. 540.

holding conclusively the state and legal character of the parties for and against all the world.(x) And this opinion is confirmed by some of the cases cited, in which persons who were neither parties nor claimed under parties to the suit in the Spiritual Court, were held to be bound by the sentence directly pronouncing upon the marriage.(y)

The conclusiveness to the Temporal Courts of sentences of the Spiritual Courts in matrimonial causes, where the question determined is directly one of marriage, is exemplified by the case of *Morris v. Webber*.(x) There it appeared that two persons had been married some years without issue. A suit was instituted in the Spiritual Court, and sentence of divorce pronounced *propter vitium perpetuum et impotentiam generationis* in the husband. Both parties married again, and each by the second marriage had several children. A question arose respecting the legitimacy of the husband's issue by the second marriage, and it was contended that the existence of such issue proved that the sentence was founded on apparent falsehood. But the common Law Court held that though this was true, yet the sentence was binding and conclusive upon them until reversed in the Ecclesiastical Court, and that therefore the issue of the second marriage were legitimate.

\*If, however, marriage is not the point determined by [ \*266 ] the sentence, but is merely matter of inference from it, the sentence is not only not conclusive, but is not even admissible evidence upon the question arising in the Temporal Courts.(a) Thus in *Hilliard v. Phaley*.(b) upon a question of legitimacy, the Court rejected the sentence in the Spiritual Court pronounced in the lifetime of the parties that they were guilty of fornication, offered as evidence to show that there was no marriage. Lord Cowper, however, said, "what could be better evidence?" and thought it hard that it had been rejected.

A sentence in a suit for jactitation of marriage not being a proceeding *in rem* is not conclusive upon the question of marriage arising in another proceeding. This was decided after much consideration on the trial in the House of Lords of the Duchess of Kingston for bigamy.(c) In that case a sentence of the Ecclesiastical Court in a suit for jactitation of marriage, pronouncing the prisoner free from matrimonial engagements, was held by the judge to be no estoppel to the proof of her marriage with the party to the suit, in support of the indictment.

One reason of the decision was that a suit for jactitation is ranked as a cause of defamation, unless where the defendant pleads a marriage: the sentence has then a negative and qualified effect, namely, that the party has failed in his proof, and that the libellant is free from all matrimonial contract as far "as yet appears," leaving it open to new proofs of the same marriage in the same cause, or to

(x) 1 Phil. Evid. 545. 8th ed.

(y) *Bunting v. Lepingwell*, 4 Rep. 29. *Harvey's case*, 11 St. Tr. 235. And see *Hildyard v. Grantham*, cited 2 Ves. sen. 246, reported 8 Mod. 180., sub nom. *Hilliard v. Phaley*, cited post.

(a) *Moore*, 255. And see 5 Rep. 98 b. 2 Leon. 169. 173. *Dyer*, 179, a.

(b) *Blackham's case*, 1 Salk. 290.

(c) 8 Mod. 180. And see 2 Wils. 124. Per Lord Hardwicke, *Brownsword v. Edwards*, Ves. sen. 246. Rep. tem. Hardw. 311.

(c) 20 How. St. Tr. 538.



any other proofs of that or of any other marriage in another cause. It is no plea to a new suit in the Ecclesiastical Court. And therefore the judges held that this sentence (even admitting it to be evidence on a criminal prosecution) could not be conclusive, but that the sentence and the judgment of the Lords might well stand together, and both propositions be true. The sentence would only prove that it did not then appear that the parties were married; but because the Court had not then sufficient proof of the marriage specified, it [ \*267 ] \*could not be inferred that there was no other marriage between them at any other time or place.(d)

Upon the general question of jurisdiction, Lord C. J. De Grey, in delivering the opinion of the judges, said:(e) Upon the subject of marriage the Spiritual Court has the sole and exclusive cognizance of questioning and deciding directly the legality of marriage, and of enforcing specifically the rights and obligations respecting persons depending upon it; but the Temporal Courts have the sole cognizance of examining and deciding upon all temporal rights of property; and so far as such rights are concerned, they have the inherent power of deciding incidentally either upon the fact or the legality of marriage: where they lie in the way to the decision of the proper objects of their jurisdiction, they do not want or require the aid of the Spiritual Courts; nor has the law provided any legal means of sending to them for their opinion, except where in the case of marriage an issue is joined upon the record in certain real writs upon the legality of a marriage, or its immediate consequence, general bastardy: in these cases upon the issue so formed, the mode of trying the question is by reference to the ordinary, and his certificate, when returned, received and entered upon the record in the Temporal Courts, is a perpetual and conclusive evidence against all the world upon that point. But even in these cases if the ordinary should return no certificate, or an insufficient one, or if the issue is accompanied with any special circumstances, as if a second issue triable by a jury be formed upon the same record; or if the effect of the same issue is put in another form; a jury is to decide, and not the ordinary to certify the truth.

The early writers treat it as clear that even in real actions, where the lawfulness of marriage came in question, a sentence of the Ecclesiastical Court might be pleaded so as to render unnecessary the trial [ \*268 ] by certificate.(f) But in a modern case, where \*in dower the tenant pleaded *ne unques accouplé*, and the demandant replied, stating a sentence of the Court of Arches in favour of her marriage, the Court of Common Pleas held the replication bad, and that the demandant must join issue to have the marriage sent for trial by the bishop.(g) It has been remarked that the sentence being in a cause which had been removed by appeal from the Bishop's Court to that of the Archbishop, the trial by certificate was giving to the inferior jurisdiction an opportunity of contradicting the sentence

(d) A consequence of this decision has been to render suits for jactitation most infrequent which had before been of familiar occurrence. Dr. Phillimore recollects but one suit of this description in his time. 1 Cas. tem. Lee, 16 n. (e) 20 How. St. Tr. 538.

(f) Bracton, 306a. 307 b. Fleta, lib. 5, c. 28. Britton, 251 b.

(g) Robins v. Crutchley, 2 Wils. 118. 127.

of the superior one, even in a case actually decided by the latter on an appeal from the former.(h) But it appears that the sentence was not like a certificate a proceeding *in rem*, being pronounced in a suit for divorce where the marriage was determined upon plea, and that therefore the decisions would not be upon the same point.

In the case of a marriage merely voidable by reason of the existence of some one of the canonical impediments afterwards enumerated, the sentence of divorce *a vinculo* must have been pronounced during the lifetime of both parties.(i) The reason of this limitation as to time, is that the sentence of the Spiritual Court, being *pro salute anime*, is needless after the death of a party. And therefore, where a man had married his first wife's sister, and after her death the Spiritual Court was proceeding to annul the marriage and bastardize the issue, the Court of King's Bench granted a prohibition *quoad hoc*, but permitted the ecclesiastical authorities to proceed to punish the husband for incest.(j) But a sentence of divorce *a vinculo* may be repealed after the death of the parties.(k)

And the limitation applies only to voidable marriages: if there was no marriage, or if there was a marriage which was void by reason of a civil disability or defect, and not merely voidable in consequence of a canonical impediment, the Spiritual Courts may \*proceed, even after the death of the parties; their sentence [ \*269 ] not then offending against the rule that the issue shall not be bastardized after the parents' death; for Lord Holt observed the issue were bastards without any proceedings of the Spiritual Courts, if the parents were never married.(l)

It is a rule both of the civil and canon laws and acknowledged in the Ecclesiastical Courts, that a sentence *contra matrimonium non transit in rem judicatam*. It is not a final judgment upon the matter, but may at any time be revised and reversed.(m) So long, however, as it remains unrepealed, the Temporal Courts are bound by it. In Kennes' case, the common law judges conceded that the sentence was reversible by the issue, against whom it was given in evidence, but still they held it conclusive to the Temporal Courts.(n)

The sentence of the Spiritual Court may be impeached in the Temporal Courts by evidence that it was obtained through fraud or collusion.(o) It would appear, however, that this can only be done by persons who were not parties to the suit in the Spiritual Court, and who cannot, therefore, as parties themselves may, procure a repeal of the judgment in that Court.(p)

(h) 1 Hargrave's Law Tracts, 454 n.

(i) 1 Roll. Ab. 360. Salk. 121. Carth. 271. Comb. 200. 4 Mod. 182. 12 Mod. 432. Elliott v. Garr, 2 Phill. 16, (1 E. Ecc. R.) (j) Salk. 584.

(k) 2 Burn, E. L. 446. See Com. Dig. Baron & Feme (c. 6.)

(l) Hemming v. Price, 12 Mod. 432. And see Pride v. Earl of Bath, 3 Lev. 410.

(m) Oughton, tit. 306. Sanchez, lib. 7, disp. 100. Bouzer v. Ricketts, 1 Hag. C. R. 314.

(n) 7 Rep. 41. And see 1 And. 165. 2 Leon, 169. The marriage of the Earl of Hereford and Lady Catherine Grey, after having been pronounced against in the reign of Elizabeth, was long afterwards impliedly acknowledged in a private act of parliament, which recites a descendant of the marriage to be heir male of the body of the first Duke of Somerset. 1 Hallam, Const. Hist. pp. 172, 398.

(o) Duchess of Kingston's case, 20 How. St. Tr. 538. Per Lord Hardwicke, 2 Ves. sen. 246.

(p) Prudham v. Phillips, Amb. 763.

Whilst treating of the effect of sentences and judgments upon the subject of marriage, it is proper to refer to the state of the authorities upon the question of the admissibility in civil cases of records of conviction for bigamy. It seems to have been formerly held that a conviction for bigamy might be admitted in a civil case, where the validity of the second marriage was in question. In one case, where a party had been libelled for jactitation of marriage, the Court of King's Bench [ \*270 ] granted a prohibition, \*because the Spiritual Court would not allow a plea that the plaintiff had been convicted of bigamy in marrying the defendant.(q) And Mr. Justice Buller states, that in the case of a father convicted on an indictment for having two wives, a conviction would be conclusive evidence in an action of ejectment, where the validity of the second marriage is in question.(r)

But the general doctrine seems now to be settled that a conviction in a criminal proceeding is not admissible in a civil action, by reason of the want of mutuality in the parties:(s) and it follows that a conviction for bigamy cannot be received to show the invalidity of the second marriage in a question of legitimacy. It appears also, that a man so convicted in respect of his marriage with the intestate, may propound his interest as the lawful husband of the deceased in a suit touching the administration of her effects in the Ecclesiastical Court: and, notwithstanding his conviction pleaded and proved, may succeed in such suit upon proof of his not having been guilty of the crime.(t)

Sentences in other criminal proceeding involving the question of marriage, are also inadmissible in civil cases. The difference in the nature of the proceedings was one of the grounds upon which the Court of King's Bench rejected a sentence of excommunication, which had been pronounced against the parents for fornication, and which was afterwards offered in evidence upon a question of legitimacy, to prove that they were not married. It was held inadmissible, "because first it was a criminal matter, and could not be given in evidence in a civil cause: next, because it was *res inter alios acta*, and could not affect the issue."(u)

Causes of nullity of marriage are either disabilities in the parties to the contract, or defects in the mode of constituting it. Disabilities are either canonical merely, or civil.

[ \*271 ] Merely canonical disabilities which render the marriage \*voidable only, were originally, first, pre-contract; secondly, consanguinity or affinity in a prohibited degree; and thirdly, impotency: of these the first is virtually abolished; the second is as regards marriages solemnized since the 31st of August, 1835, made a civil disability, rendering the marriage void; and the last only remains as a merely canonical disability.

By statutes 26 Geo. 2, c. 33, s. 13, and 4 Geo. 4, c. 76, s. 27, no suit can be had in the Ecclesiastical Court to compel celebration of marriage by reason of any contract, whether *per verba de presenti*, or

(q) *Boyle v. Boyle*, 3 Mod. 164. Comb. 72, S. C.

(r) Bull. N. P. 245.

(s) 1 Phill. Ev. 520, 8th Ed.

(t) *Wilkinson v. Gordon*, 2 Add. 152, (2 E. Ecc. R.)

(u) *Hillyard v. Grantham*, cited by Lord Hardwicke, 2 Ves. sen. 246. Rep. tem. Hardw. 311.

*per verba de futuro*; and the disability arising from pre-contract has been considered to be impliedly taken away by this enactment.(v)

Marriages between persons within the prohibited degrees, solemnized after the 31st of August, 1835, are void, and not merely voidable: and this impediment is now therefore a civil disability, and will be afterwards considered as such. Marriages between persons within the prohibited degrees of *affinity*, solemnized before the 31st of August, 1835, cannot now be annulled for that cause.(w)

A bodily defect, rendering consummation of the marriage impossible, is a sufficient ground for annulling the contract. Suits of this kind are not entertained, except where the imperfection is palpable, unless the parties have been in continued cohabitation for three years; and where the proof of the defect is doubtful, a further cohabitation is enjoined.(x) A party who contracts marriage, knowing himself to be impotent, will not be permitted to set it aside on this ground.(y)

Civil or legal disabilities, if proved in the Temporal Courts, show the marriage to have been absolutely void *ab initio*. They are:

\*First, a prior marriage of either of the parties, subsisting at the time of the marriage in question.(z) Certain [ \*272 ] statutes exempt from the punishment of bigamy persons who marry again after their husbands or wives shall have been seven years absent from them under certain circumstances, but no validity is imparted to the second marriage.(a)

Secondly, want of age in one of the contracting parties coupled with disagreement from the marriage by either of them upon the party so disabled coming to the legal age of consent, that is, fourteen in males and twelve in females.(b) If the parties continue after these ages to cohabit as husband and wife this amounts to an agreement to the marriage, even though they disagree by parol or in writing: unless the disagreement be made before the ordinary.(c) The consent of the parents or guardians was under Lord Hardwicke's Act necessary to the validity of marriages by infants under twenty-one, as will appear in treating of the required preliminaries or incidents to marriage.

Thirdly, want of reason. The marriages of idiots *a nativitate*, though formerly held valid and the issue legitimate, are now clearly void.(d) as are also the marriages of lunatics not being in a lucid interval.(e) And if a person has been found lunatic under a commission or committed to the care of trustees by Act of parliament, his marriage, before he is declared of sound mind by the Lord Chancel-

(v) 1 Hargrave Co. Litt. 79 b. n. (4) But see 1 Bl. Com. 435. 440.

(w) Stat. 5 & 6 Wm. 4, c. 54.

(z) Oughton, tit. 217. Ayliffe's Parergon, tit. Divorce. Briggs v. Morgan, 2 Hagg. C. R. 324, (4 E. Ecc. R.) Greenstreet v. Cumyns, 2 Phillim. 10, (1 E. Ecc. R.) Brown v. Brown, 1 Hagg. E. R. 523, (3 E. Ecc. R.)

(y) Norton v. Seton, 3 Phillim. 147, (1 E. Ecc. R.)

(x) 1 Roll. Abr. 340. 357. Cro. El. 858. 1 Salk. 121. 1 Str. 79.

(a) 1 Jac. 1, c. 2. 35 Geo. 3, c. 67.

(b) Co. Litt. 79 a., n. (1 and 2). Swinh. on Espousals, 34. Lyndw. Prov. 272.

(c) Com. Dig. Baron & Feme, C. B. 57.

(d) 1 Roll. Ab. 357. Co. Litt. 80 a. n. (1). Browning v. Reave, 2 Phill. 69. 91, (1 E. Ecc. R.)

(e) Morison's case, coram Delegat. 1745, cited 1 Bl. Com. 439. Parker v. Parker, 1757. Cloudesley v. Evans, Prerog. 1763, cited 1 Hagg. C. R. 417, (4 E. Ecc. R.) See 2 Phill. 19 (1 E. Ecc. R.)



lor or the majority of such trustees, is also void; (f) although contracted in a lucid interval; (g) and even where there has been no commission, if it is first found that the person was generally insane, the Court will require it to be shewn by strong evidence that the marriage [ \*273 ] was clearly had in a lucid interval. (h) \*A lunatic party to a marriage may sustain a suit for nullity after his recovery from lunacy; (i) but in this case the degree of proof must be stronger than ordinary. (j) The committee of a lunatic may also institute such a suit. (k) The finding of the jury under a commission is merely part of the evidence of insanity, the Ecclesiastical Court requiring to be satisfied by its own evidence that grounds of nullity existed. (l)

In the case of the Earl of Portsmouth, (m) a marriage effected by clandestinity and fraudulent circumvention with a person of weak and unsound mind, though not actually proved to be deranged, was held to be null, as wanting the consent of a free and rational agent.

The validity of a marriage alleged to be void by reason of the mental incapacity of a party may be disputed in the Spiritual Court after the death of such party. (n) The sentence of nullity in the case of these void marriages is merely declaratory, and the Temporal Courts may treat them as null although there be no such sentence. (o)

Another civil disability is created by stat. 5 and 6 W. 4, c. 54, which, after reciting that marriages between persons within the prohibited degrees were voidable only by the sentence of the Ecclesiastical Court pronounced during the lifetime of both the parties, and that it was fitting that all marriages which might thereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity should be *ipso facto* void and not merely voidable, enacts, that such marriages, celebrated after the 31st of August, 1835, shall be absolutely null and void to all intents and purposes whatsoever.

A marriage subsequently to the 31st of August, 1835, may therefore be shewn to be void by proof that the parties were related to [ \*274 ] each other within the prohibited degrees of consanguinity or affinity. It is more easy to state what are the prohibited degrees, as they have been received and acted upon in decided cases, than to refer to any clear definition of them having authority in the Temporal Courts. Looking only to the statutes upon the subject (p) it is difficult to determine which and how much of them are in force: but the authorities appear to proceed upon the supposition that so much of the statute 32 Hen. 8, c. 38, as permits of mar-

(f) Stat. 15 Geo. 2, c. 30. Extended to Ireland by 51 Geo. 3, c. 37.

(g) 1 Hagg. C. R. 417, (4 E. Ecc. R.)

(A) Ibid.

(i) Turner v. Meyers, 1 Hagg. 414, (3 E. Ecc. R.)

(j) Ibid. 418.

(k) 2 Phill. 160, (1 E. Ecc. R.) 2 Hagg. C. R. 171, (4 E. Ecc. R.)

(l) 2 Phill. 90, (1 E. Ecc. R.)

(m) 1 Hagg. E. R. 355, (3 E. Ecc. R.) 3 Add. 63, (2 E. Ecc. R.)

(n) Browning v. Reave, 2 Phill. 69, (1 E. Ecc. R.)

(o) See ex parte Turing, 1 Ves. & B. 140. 1 Browne's Civil Law, 88 n.

(p) 25 Hen. 8, c. 22. 28 Hen. 8, c. 7. 32 Hen. 8, c. 38. 2 & 3 Ed. 6, c. 23. 1 & 2 Ph. & M. c. 8, s. 9, and 1 Eliz. c. 1, ss. 11, 12. The table of degrees hung up in churches was settled by the 99th of the canons of 1603, which do not *proprio vigore* bind the laity. Middleton v. Crofts, 2 Atk. 650.

riages without the Levitical degrees is now law.(g) The language of this part of the statute is that every marriage "solemnized between persons not prohibited by God's law shall be indissoluble, and no prohibition shall operate (God's law except) to impeach any marriage without the Levitical degrees." The degrees prohibited by the Levitical law(r) are all within the fourth degree of collateral consanguinity, according to the computation of the civil law, that is, counting from the one party to the other through the common ancestor. An uncle and his niece are related in the third degree, and their marriage is accordingly invalid.(s) First cousins are related in the fourth degree and may therefore intermarry. A man and his grand-niece or his grand-aunt, or a woman and her grand-nephew or grand-uncle are related in the same degree and a marriage between them is consequently valid.(t) Persons related, however distantly, by the direct ascending and descending line are prohibited from intermarriage both by the civil and canon laws;(u) and this prohibition is adopted by the law of England.(v)

The consanguinity which is regarded for this purpose is natural and not merely legal consanguinity. And therefore a [ \*275 ] bastard \*and another person related within the prohibited degrees, or persons so related through bastards, cannot intermarry.(w)

Marriages of persons between whom there is an affinity, or relationship by marriage, within the above degrees, are also prohibited. Thus a surviving party to a marriage cannot marry a person related by blood within the fourth degree to the deceased party; and it follows that a man cannot marry his wife's sister or neice or aunt.(x) Upon these marriages it may be observed that the stat. 1 Mar. st. 2, c. 1, although passed only for the purpose of declaring valid the marriage of Henry the 8th with his first Queen, Catherine, the widow of his brother Arthur, recites that that marriage was not prohibited by the law of God, and had its beginning of God, and was a most true, just, and lawful marriage, and then enacts that it should be declared, deemed and adjudged to be and stand with God's law and his most holy word, and to be accepted, reputed and taken of good effect and validity to all intents and purposes. This language has been thought to be more general than was required to validate a particular marriage, and coupled with that part of the 32 Hen. 8, c. 38, which refers to God's law, leaves room for doubt whether it was not intended to op-

(g) Vaugh. 309. 3 Keb. 166. 2 Burn's Ecc. Law, 405. 2 Com. Dig. Baron and Feme (B. 4).

(r) In Alleyne's Legal Degrees of Marriage several authorities are collected (among them a letter to the author by Sir William Jones) to shew that the 18th chapter of Leviticus has no reference whatever to marriage; and this opinion is supported by those parts of the Jewish law which admit, and even enjoin, the marriage of a man with his brother's widow.

(s) Burgess v. Burgess, 1 Hagg. C. R. 384, (4 E. Ecc. R.)

(t) Harrison v. Burwell, Vaugh. 218. 241. 250. Eq. Ca. Ab. 159. Gibs. Cod. 498.

(u) Dig. lib. 23, tit. 2, l. 53. lib. 38, tit. 10, l. 4, s. 7. Gibs. Cod. 497.

(v) Vaugh. 242. 2 Ventr. 18. Gibs. Cod. 412.

(w) Haines v. Joffel, Com. 2. 1 Lord Raym. 68. 5 Mod. 168. Comb. 356. See also 11 East, 4. 1 Hagg. C. R. 353. 393, (4 E. Ecc. R.) Horner v. Liddiard, Dr. Croke's Rep.

(x) Hill v. Good, Vaugh. 305. 3 Lev. 364. Eq. Ca. Ab. 156. 3 Keb. 156. Butler v. Gastrill, Gibs. 156. Com. 318. 2 Com. Dig. Baron and Feme (B. 4.) Wortley v. Watkinson, cited Burn's Ecc. Law, tit. Marriage. Snowling v. Nursey, Ibid. Gibs. Cod. 412, 413. Harris v. Hicks, 2 Salk. 548.

rate as a legislative declaration of the general validity of a man's marriage with his brother's widow.(y) It is remarkable that it should not have attracted the notice of the Court in deciding the cases of Hill v. Good, and Butler v. Gastrill. Those cases must however be considered as having definitely settled that there is the same prohibition in regard to degrees of affinity as to degrees of consanguinity, on the [ \*276 ] principle that husband and wife being one flesh \*the kindred of the husband are the kindred of the wife, and vice versa.(z)

But affinity is terminated in the husband himself from the wife's kindred, and in the wife herself from the husband's kindred.(a) There is thus no affinity between the kindred of the wife and the kindred of the husband. A man may therefore lawfully marry his brother's wife's sister; and a son by a first marriage may marry his father's second wife's sister, or such wife's daughter by a former marriage.(b) And though a man cannot marry his brother's widow, she being by affinity his sister, he may marry the widow of his wife's brother.

It follows from what has been said, that the issue of marriages, solemnized between persons within the prohibited degrees before the 31st of August, 1835, are legitimate, unless the marriage is declared null during the lifetime of both the parents;(c) and that by the statute 5 & 6 Wm. 4, c. 54, marriages between persons within the prohibited degrees of affinity, which were solemnized before the 31st of August, 1835, cannot now be annulled for that cause.(e) But such marriages, as well as those within the prohibited degrees of consanguinity, solemnized since that day, are absolutely void, and the issue consequently illegitimate.

Of the causes of nullity of marriage which consist in the defective constitution of the contract, one, which has been already partly considered, is want of consent. The will or consent of the parties is of the essence of marriage. *Consensus non concubitus facit matrimonium.*(f) Their want of a consenting mind is the reason why the marriages of infants under the age of consent, and of idiots and lunatics, are *ipso facto* void: but as this want creates in them a general incapacity to contract any marriage, it has been already considered in the character of a disability. A particular marriage which the party was able to contract, but to which consent was wanting, is also [ \*277 ] void. Thus a marriage by duress or \*under the influence of force or fear is invalid.(g) A marriage is also void if

(y) Alleyne's Legal Degrees of Marriage. In Richard Parson's case, 2 Jac. 1, mentioned by Lord Coke, Co. Litt. 235, the marriage of a man with the daughter of his first wife's sister was determined not to be within the Levitical degrees, and a prohibition was granted; but a consultation being awarded on debate two years after, the case is said to have been expunged from the First Institute by order of the King in Council. It was restored in the ninth edition. Butler's note on the passage. (z) Gibs. Cod. 412.

(a) Wood's Civ. Law, 119.

(b) 2 Inst. 684.

(c) 4 Vin. Ab. 35.

(e) Unless the suit was instituted before the passing of the act. Upon what amounts to a pending of the suit, and upon the interest sufficient in the promotor, see Ray v. Sherwood and Ray, 1 Curteis, 173, 193, (6 E. Ecc. R.) S. C. afterwards before the Privy Council.

(f) Co. Litt. 33 a.

(g) According to the better opinion such a marriage is void, and not merely voidable by sentence. Fulwood's case Cro. Car. 488. Keble v. Vernon, Keilway, 52 b. Com. Dig. tit. Baron & Feme, (B. 6.) Vin. Ab. tit. Marriage. Harford v. Morris, 2 Hagg. C. R. 423, 436, (4 E. Ecc. R.) Portsmouth v. Portsmouth, 1 Hagg. E. R. 355, (3 E. Ecc. R.)

one of the parties was under the influence of fraud or error respecting the person of the other: but the marriage is not affected by the error of one party respecting the fortune or personal qualities of the other: (h) nor is it vitiated by an error respecting the name, further than to the extent afterwards mentioned, by reason of the statutory provisions respecting the required preliminaries to marriage.

Cases of nullity of marriage, which consist in defects in the *form* of constituting the contract, were first introduced by Lord Hardwicke's Act, 26 Geo. 2, c. 33, A. D. 1754. Others have been added by subsequent statutes that in general have no retrospective effect, but leave the validity of anterior marriages to be tried by the law then in force, which therefore, with reference to questions of legal consanguinity, cannot be dismissed from consideration.

One prominent distinction may be first noticed between marriages solemnized under Lord Hardwicke's Act, 26 Geo. 2, c. 33, and those which have taken place since the repeal of that act by the 4 Geo. 4, c. 76, that is, between those celebrated after the 25th of March, 1754, and before the 1st of November, 1823, and those celebrated since the later period. It is that the former may be shewn to be invalid by reason of their having been celebrated in an unauthorized manner, notwithstanding the *bonâ fides* of the parties, and their ignorance of any want of compliance with the formalities prescribed by the act: whereas in order to impeach the validity of the latter, it must be established that the parties *knowingly and wilfully* intermarried in an unauthorized manner. It seems clear, from the language of the acts, and has indeed been decided, (i) that *both* the parties must have a knowledge of the irregularity, otherwise the marriage is not within the clause of nullity, and will therefore be good, if notwithstanding its want of conformity to the statutable mode of solemnization, it amounts to a marriage by the general law apart [ \*278 ] from the marriage acts. (j)

Fatal defects in the form of the constitution of the contract may be considered as they regard, I. The preliminaries to marriage; II. The place in which, and, III. The persons before whom it was celebrated.

I. Of the required preliminaries to marriage. The publication of banns, or a license from the bishop dispensing with such publication, was, before Lord Hardwicke's Act, a preliminary required by the canon law to every marriage. A non-observance of such alternative preliminaries, did not, however, avoid the marriage, but merely subjected the parties and the officiating minister to ecclesiastical censure, (k) and to fines under certain statutes. (l)

The act just mentioned made the observance of one of these pre-

(h) *Wakefield v. McKay*, 1 Phillim. 134, (1 E. Ecc. R.) *Brower De Jure Connub.* c. 18, n. 6. (i) *Rex v. Wroston*, 4 B. & Ad. 641, (24 E. C. L. R.)

(j) By the canon law the issue of a marriage void from any cause are legitimate, if either of the parents have entered into it *bonâ fide*. *Brower*, lib. 2, c. 5, n. 52. In 1811, a case came before the Court of Session in Scotland respecting the validity of a marriage where the woman during the life of her husband, contracted a second marriage with a person ignorant of the first. The judges were equally divided on the question, whether the rule formed part of the law of Scotland. It is certainly no part of the law of England. See 2 *Roper, Husband & Wife*, 465, and *Poynter on Marriage and Divorce*, 260, (Law Library.)

(k) See per Lord Eldon, 6 Ves. 426. *Gibbs Cod.* 425. 2 Atk. 669.

(l) 6 & 7 Wm. 3, c. 6. 7 & 8 Wm. 3, c. 33. 10 Ann. c. 19.

liminaries essential to the validity of marriages, and its provisions still govern(m) those celebrated after the 25th of March, 1754, and before the 1st of September, 1822.

And first, where the solemnization was by banns: the eighth section enacted that marriages solemnized "without publication of banns," or license, should be null and void. A prior clause directed that notice should be given to the minister of the true Christian and surnames of the parties: and it has therefore been considered that the publication must have been in the true names:(n) that a publication of false names [ \*279 ] was no publication, \*and that marriages consequent thereupon were void without reference to the object for which the false names were assumed; even though the assumption took place from mere levity, and though there was no intention to mislead, and no person interested was deceived.(o)

A partial variation from the real name, which disguised its identity as much as a change to an entirely false one, was equally fatal to the marriage, notwithstanding the absence of any fraudulent design.(p) Upon the degree of variation which would of itself avoid the marriage, it has been held that the omission(q) or interpolation(r) of a Christian name, or the addition of a final s(s) had not this effect; but that the alteration of the surname from Meddowcroft to Widdowcroft, and from Longley to Long, was fatal to the marriage. Where the variation was not so great as to be a necessary cause of deception, or where "the disguising effect of the variation does not appear on the very face of the name,"(t) the validity of the marriage depends greatly, or perhaps wholly, on the question whether the misnomer originated in a fraudulent intent. If it was accidental, or proceeded from a cause shewing *bonâ fides* of the parties, the marriage will be supported: but if a fraudulent design appears (and *primâ facie* the variation will be held fraudulent, and must be explained by evidence to be casual or *bonâ fide*),(u) the marriage will be invalid. The Courts proceed upon the principle that what a party intended to be sufficient to disguise the name, should be so considered as against him:(v) although it has been remarked that this is rather beyond a strict interpretation of the statute, which would determine the validity of the marriage by the [ \*280 ] answer to the question, whether that which has taken place \*is publication of banns, and without reference to the intention with which it was done.(w)

If the evidence of the cause of the misnomer is insufficient to dis-

(m) See 1 Add. 94 n.

(n) *Rex v. Billingshurst*, 3 M. & S. 250. *Pougett v. Tomkins*, Ibid. 262. 2 Hagg. C. R. 142, (4 E. Ecc. R.) 1 Phill. 499, (1 E. Ecc. R.)

(o) *Frankland v. Nicholson*, 3 M. & S. 259. *Mather v. Ney*, Ibid. 265. *Rex v. Tibshelf*, 1 B. & Ad. 190, (20 E. C. L. R.) See also 2 Hagg. C. R. 254, (4 E. Ecc. R.)

(p) 2 Hagg. C. R. 254, (4 E. Ecc. R.)

(q) *Pougett v. Tomkins*, 3 M. & S. 262. 2 Hagg. C. R. 142, (4 E. Ecc. R.) 1 Phill. 499, (1 E. Ecc. R.) See *Rex v. Tibshelf*, ubi sup.

(r) *Sullivan v. Sullivan*, 2 Hagg. C. R. 238, (4 E. Ecc. R.) 3 Phill. 45, (1 E. Ecc. R.) *Heffer v. Heffer*, 3 M. & S. 265. 2 Hagg. C. R. 255 n., (4 E. Ecc. R.) *Green v. Dalton*, 1 Addams, 289, (2 E. Ecc. R.) *Rex v. Tibshelf*, ubi sup.

(s) *Dobbyn v. Cornrek*, 2 Phil. 102. (1 E. Ecc. R.)

(t) 2 Hagg. C. R. 258, (4 E. Ecc. R.)

(u) *Sullivan v. Sullivan*, 2 Hagg. C. R. 258, (4 E. Ecc. R.)

(v) 2 Hagg. C. R. 255, (4 E. Ecc. R.) (w) See *Jacob*, 2 Roper's Husb. & Wife, 491, n.

prove fraud, but leaves the existence of it doubtful, it is allowable to enter into evidence of other facts shewing the fraudulent intention with which the variation of name was made.(x) But the non-residence of the parties in the parish where the banns were published cannot be proved even for this purpose,(y) the reception of that evidence being prohibited by the express provisions of both the old and existing marriage acts.(z) With this exception, the Court will advert to all the circumstances; and, therefore, even the singularity of the surname will have weight, as tending to shew that the omission of a Christian name was not resorted to for the purpose of concealment;(a) such omission, if with a fraudulent design, being fatal to the marriage.(b)

On the question, what are the true Christian and surnames of the parties? Lord Stowell has observed, that where there is a name of baptism, and a native surname, those are the true names, unless they have been overridden by the use of other names assumed and generally accredited.(c) A name acquired by reputation alone, has, in several cases, been held to be the true name within the statute.(d) Illegitimate children having no proper surname, except such as they acquire in this manner,(e) the name which should be used in their banns is that by which they are usually known.(f)

Where, in the solemnization, the woman, by the man's consent, \*personated another woman, in whose name the [ \*281 ] banns had been published, the marriage was held void, on account of the undue publication.(g)

The statute did not require any description of the *status* or additions of the parties, and therefore where a woman was called a widow in the banns, when in fact she was not, the marriage was held to be not thereby avoided.(h)

So, according to Lord Stowell, a false description of residence is a mere *impedimentum impeditivum*, imposing on the clergyman, if the fact be known to him, the duty of not proceeding with the marriage, but not invalidating the ceremony if once performed; whereas the publication of false names is an *impedimentum dirimens*, invalidating the marriage *in toto*.(i) And a marriage by banns is valid, though neither or only one of the parties resided in the parish.(j)

The banns were directed to be published upon three Sundays preceding the marriage.(k) In one case the husband was allowed to prove that the banns were published only twice: but his credit was

- (x) *Pongett v. Tomkins*, 3 M. & S. 264. 2 Hagg. C. R. 146, (4 E. Ecc. R.)
- (y) *Priestley v. Lamb*, 6 Ves. 422. 2 Hagg. C. R. 147, (4 E. Ecc. R.) *Tree v. Quin*, 3 M. & S. 266, 2 Phill. 14, (1 E. Ecc. R.) See *Ibid.* 104.
- (z) 26 Geo. 2, c. 33, s. 10. 4 Geo. 4, c. 76, s. 26. 6 & 7 Wm. 4, c. 85, s. 25.
- (a) *Sullivan v. Sullivan*, 2 Hagg. C. R. 258, (4 E. Ecc. R.)
- (b) *Tree v. Quin*, *Heffer v. Heffer*, *ubi sup.* *Stanhope v. Baldwin*, 1 Add. 94, (2 E. Ecc. R.)
- (c) 2 Hagg. C. R. 254, (4 E. Ecc. R.)
- (d) *Rex v. Billingshurst*, 3 M. & S. 250. *Mayhew v. Mayhew*, *Ibid.* 266. 2 Phill. 11, (1 E. Ecc. R.) 3 M. & S. 260. *Wilson v. Brockley*, 1 Phill. 132, (1 E. Ecc. R.)
- (e) 2 Hagg. C. R. 253, (4 E. Ecc. R.)
- (f) *Sullivan v. Sullivan*, 2 Hagg. 238, (4 E. Ecc. R.) *Wilson v. Brockley*, *ubi sup.* 3 Phill. 45, (1 E. Ecc. R.) *Wakefield v. Wakefield*, 1 Hagg. C. R. 394, (4 E. Ecc. R.) 1 Phill. 134 n., (1 E. Ecc. R.)
- (g) *Farquharson v. Farquharson*, 3 Add. 282, (2 E. Ecc. R.)
- (h) *Mayhew v. Mayhew*, 3 M. & S. 266, and see *Wright v. Ellwood*, 2 Hagg. E. R. 598, (4 E. Ecc. R.) 1 Curteis, 89 S. C. (i) 2 Hagg. C. R. 253, (4 E. Ecc. R.)
- (j) 16 Ves. 259. 18 Ves. 289, see also 6 Ves. 423. (k) 26 Geo. 2, c. 33, s. 1.

left to the jury, on account of the nature of his evidence, and he was not believed.(l)

It was provided by stat. 3 Geo. 4, c. 75, s. 19, that marriages should not be avoided by reason of publication of banns in false names, but this part of the act was repealed in the following year; and by the stat. 4 Geo. 4, c. 76, ss. 7 and 22, if the parties knowingly and wilfully intermarry without due publication of banns, the marriage is void. It has accordingly been held, that where with a view to concealment, one of the Christian names of the husband was omitted in the publication of banns, and both parties were cognizant of the omission, it was a void marriage.(m)

[ \*282 ] \*In a recent case, the husband was a minor of seven-teen, and the wife about thirty-five, and the sister of a person to whom the husband had been confided as a pupil: the husband's baptismal name was Edward Croxall Tongue, but he had been generally called Croxall only: the banns were published in the name of Edward, with the knowledge of both parties, and the marriage was kept secret above twelve months. The marriage was held void by the Consistory Court, and on appeal by the Court of Arches; and the judgment was affirmed by the Judicial Committee of the Privy Council.(n)

Where in the banns the woman was described as a spinister, but was in fact at that time a married woman of that name, and became unmarried by her first husband's death before solemnization, the marriage was held not to be void, either by reason of the former marriage, or by reason of undue publication, the second husband believing her to have been then a spinister, and both parties therefore not having been cognizant of the informality.(o)

By the twenty-sixth section of the statute last cited, no objection can be made to the marriage on account of either of the parties' non-residence in the parish where the publication took place.

Where before the New Marriage Act a marriage might be solemnized after publication of banns, such marriage may now be solemnized in like manner, on production of the registrar's certificate, which is to be obtained after notice given to the superintendent registrar of the intended marriage, as in the act provided. The want of this notice or certificate is fatal to marriages under the act; but in those which are celebrated according to the rites of the church of England, publication of banns or the notice and certificate may be resorted to at the discretion of the parties.(p)

[ \*283 ] \*The clause of nullity applies where persons knowingly and wilfully intermarry without *due notice* to the superintendent registrar, or without certificate of notice *duly issued*. The form of notice is set forth in a schedule to the act, and comprises a full description of the parties. As the reading of these notices at meetings of the board of guardians, or the suspension of them in the regis-

(l) Standen v. Standen, Peake N. P. C. 32.

(m) Wiltshire v. Wiltshire, 3 Hagg. E. R. 333, (5 E. Ecc. R.) 1 Curteis, 38, (6 E. Ecc. R.)

(n) Tongue v. Allen, 1 Curteis, 38, (6 E. Ecc. R.)

(o) Wright v. Elwood, 2 Hagg. E. R. 598, (4 E. Ecc. R.) 1 Curteis, 49, (6 E. Ecc. R.) Arches Court, 8th Nov. 1837, S. C.

(p) 6 & 7 Wm. 4. c. 85, s. 1, explained and amended by stat. 1 Vict. c. 22, ss. 1, 36.

tar's office, (q) seems intended to serve the same purpose as publication of banns, it is probable that the foregoing decisions on misdescriptions in banns will be held applicable to misdescriptions in notices.

It is not necessary in support of a marriage to give any proof of the actual dwelling of either of the parties previously to the marriage within the district for the requisite time, nor can any evidence be given to prove the contrary in any suit touching the validity of such marriage. (r)

It must be here observed, that although neither banns nor license were before the act necessary to the validity of Jewish or Quaker marriages, the want of notice or certificate is now fatal to them. (s)

The alternative for banns by Lord Hardwicke's Act is a "license from a person having authority to grant the same," and the want of such a license was a cause of nullity, without reference to the knowledge of the parties. In one case the question arose but was not decided, whether the want of authority in the person granting the license would avoid the marriage. (t)

Under the stat. 4 Geo. 4, c. 76, the marriage is not void unless the parties *knowingly and wilfully* intermarry without a license from an authorized person. It had been held under the former act, that a misdescription in the license, where the identity of the parties was clear, (u) or the use of an assumed name, by which \*the [ \*284 ] party was commonly known, (v) or a slight alteration of the name in the license, (w) would not vitiate it and avoid the marriage. But the license might be vitiated by a fraudulent misdescription or alteration, (x) and even under the existing act the marriage would be void if both parties were privy to the fraud, the license issued not being a license for the marriage celebrated.

By the stat. 4 Geo. 4, c. 5, marriages solemnized by virtue of licenses granted after the passing of the 3 Geo. 4, c. 75 (22nd July, 1822,) and before the passing of that act (7th of March, 1823,) by persons authorized by law before the former time are declared valid.

Various provisions are contained in the stat. 4 Geo. 4, c. 76, respecting the mode of obtaining and granting licenses; and these still govern all marriages by license according to the rites of the Church of England.

By the New Marriage Act, 6 & 7 Wm. 4, c. 85, the superintendent registrar is empowered to grant licenses; for marriages in registered buildings within his superintendence or in his office, but not in churches or chapels of the establishment. Marriages without license, in case a license is necessary under the act, are null and void.

There was no provision in Lord Hardwicke's Act to destroy the effect of the banns or license, if the marriage was not celebrated within a limited time; and unless the license contained a condition of defeasance, a marriage celebrated between the parties at any distance of time afterwards would be valid.

(q) 1 Vict. c. 22, s. 24.

(r) 6 & 7 Wm. 4, c. 85, s. 25.

(s) See ss. 1, 42.

(t) Balfour v. Carpenter, 1 Phill. 304, (1 E. Ecc. R.)

(u) Ewing v. Wheatley, 2 Hagg. C. R. 175, (4 E. Ecc. R.)

(v) Cope v. Burt, 1 Phill. 224, (1 E. Ecc. R.) Rex v. Burton upon Trent, 3 M. & S. 537.

(w) Ewing v. Wheatley, ubi sup.

(x) 2 Hagg. C. R. 182, (4 E. Ecc. R.)



But under the act of 4 Geo. 4, c. 76, licenses from surrogates are in force for three months only, and if, after complete publication of banns, the marriage is not solemnized within the same time, republication is necessary.<sup>(y)</sup> So, if marriages under the recent [ \*285 ] statute are not celebrated within three months after the entry of notice, all proceedings thereon are void, and fresh notice must be given.<sup>(z)</sup>

Marriages of minors by license under Lord Hardwicke's Act were liable to be impeached by proof of non-compliance with another preliminary; the consent of parents or guardians. By section 11, marriages solemnized by license, where either of the parties, not being a widower or widow, should be under twenty-one years, without the consent of the minor's father, if living, or, if dead, of the guardian lawfully appointed; or if no such guardian, of the mother, if living and unmarried; or if no such mother, of a guardian appointed by the Court of Chancery, should be absolutely null and void.

The marriage of a bastard has been held to be within this clause; but the consent of the mother or putative father was not deemed sufficient.<sup>(a)</sup>

The "guardian lawfully appointed" has been held to refer to a guardian appointed by the father under the stat. 12 Car. 2, c. 24;<sup>(b)</sup> and therefore the marriage of a minor with the consent of a guardian appointed by will not attested by two witnesses was held invalid.<sup>(c)</sup> And it is only a guardian of this kind, or one appointed by the Court of Chancery who can, under the existing acts, consent to the marriage of a minor: and the latter guardian cannot do so whilst the mother is living and unmarried.

Under this act, strict proof of want of consent and of minority was required to invalidate a marriage,<sup>(d)</sup> but the parents' or guardians' total ignorance of the marriage sufficiently established the former cause of nullity.<sup>(e)</sup> Their acquiescence in the marriage [ \*286 ] \*after the solemnization might however form a ground for inferring their previous consent to it.<sup>(f)</sup>

The second section of the stat. 3 Geo. 4, c. 75, enacts, that marriages which had been solemnized by license, without the consent required by the 26 Geo. 2, c. 33, and were therefore void under that statute, should be deemed valid in cases where the parties should have continued to live together as husband and wife, until the death of one of them, or until the passing of the act, or should only have discontinued their cohabitation during the pendency of proceedings touching the validity of such marriage.

Upon the construction of this section (which was not repealed by

(y) 4 Geo. 4, c. 76, ss. 9, 19.

(z) 6 & 7 Wm. 4, c. 85, s. 15.

(a) *Priestley v. Hughes*, 11 East, 1. *Rex v. Hodnett*, 1 T. R. 96. See also *Horner v. Liddiard*, Dr. Croke's Report.

(b) See *Horner v. Horner*, 1 Hagg. C. R. 365, (4 E. Ecc. R.)

(c) *Reddall v. Liddiard*, 3 Phill. 256, (1 E. Ecc. R.)

(d) *Agg v. Davies*, 3 Phill. 341, (1 E. Ecc. R.) *Ibid.* 41. 1 Phill. 223, (1 E. Ecc. R.)

(e) *Balfour v. Carpenter*, 1 Phill. 221, (1 E. Ecc. R.) 3 Phill. 44.

(f) *Hodgkinson v. Wilkie*, 1 Hagg. C. R. 262, (4 E. Ecc. R.) And see further on this cause of nullity, *Smith v. Huson*, 1 Phill. 306, (1 E. Ecc. R.) *Selby v. Selby*, 1 Phill. 298, (1 E. Ecc. R.) *Hayes v. Watts*, 3 Phill. 43, (1 E. Ecc. R.)

the 4 Geo. 4, c. 76.) (g) it has been held that a separation by agreement, on which a deed was executed, providing a separate maintenance for the wife, did not prevent the continuance of the parties to live together as husband and wife within the meaning of the act. The separation was apparently without any reference to doubts entertained by both or either of the parties as to the validity of the marriage, and in the instrument of separate maintenance the woman was styled and treated as the wife of the party. (h)

But where, after a separation without any such deed, the man had insisted, on various occasions, that the woman was not his lawful wife, and had given that as a reason for refusing to live with her, it was held, notwithstanding some slight evidence of small sums being allowed to the woman, that these parties did not live together within the meaning of the act. (i)

The third section provides, that nothing in the act contained [ \*287 ] should render valid any marriage which had been previously declared invalid by any court of competent jurisdiction, nor any marriage where either of the parties should at any time afterwards during the life of the other, have lawfully intermarried with any other person. This section has been construed to be retrospective only, and not prospective; and therefore, where the first marriage was rendered valid by the parties continuing to live together till the passing of the act, it was held not to be rendered invalid by the marriage of one of the parties during the life of the other, with a third person. (j)

By the fourth and fifth sections, the act was not to render valid any marriage, the invalidity of which had been previously established upon the trial of any issue touching its validity or touching the legitimacy of any person alleged to be the descendant of the parties to such marriage, or any marriage, the validity of which, or the legitimacy of any descendant from the parties to which had been brought into question in causes or suits at law or in equity, in which judgments, decrees, or orders had been made, in consequence of proof of the invalidity of such marriage, or the illegitimacy of such descendant. And by the sixth section, where any property, real or personal, had been possessed, or any title of honour enjoyed on the ground of the invalidity of any such marriage, the right and interest in such property or title of honour should not be affected by the act. Nor was it (by the seventh section) to call in question any act done under the authority of any court, or in the administration of any personal estate, or the execution of any will, or the performance of any trust.

Where an infant was married by license, without consent of parents, between the repeal of the 26 Geo. 2, c. 33, by the 3 Geo. 4, c. 75, and the time when the latter act came into operation, the marriage was held to be valid. (k)

By the 4 Geo. 4, c. 76, s. 14, before the grant of a license, one of

(g) *Rose v. Blakemore*, 1 Ry. & Moo. 382, (21 E. C. L. R.)

(h) *King v. Sansom*, 3 Addams, 277, (2 E. Ecc. R.) affirmed on appeal to the Court of Arches. See also *Bridgwater v. Crutchley*, 1 Addams, 473, (2 E. Ecc. R.)

(i) *Poole v. Poole*, 2 Cr. & J. 66, 2 Tyrw. 76, S. C.

(j) *Rex v. St. John Delpike*, 2 B. & Ad. 226, (22 E. C. L. R.)

(k) *Waully's case*, 1 Ry. & Moo. 163, (21 E. C. L. R.)

the parties shall swear to his or her belief that there is no lawful impediment, and to their residence, and also where either [ \*288 ] \*of the parties, not being a widow or widower, is under the age of twenty-one, that the consent of the persons whose consent is required by that act has been obtained; but if there be no such persons, the license may be granted without such consent.

By section 16, the father, or if the father be dead, the guardians lawfully appointed; or if none, then the mother, if unmarried; or if none such, then the guardians appointed by the Court of Chancery, if any, shall have authority to give consent to the marriage, and such consent is thereby required unless there shall be no person authorized to give such consent. By section 17, in case of the father being *non compos mentis*, or of the guardian or mother being so, or beyond the seas, or unreasonably refusing to consent, the Court of Chancery may authorize the marriage.

The act does not enforce the requisition of consent by a clause of nullity: and, therefore, where a marriage was solemnized by license, the husband being a minor whose father was living and did not consent to the marriage, it was held to be nevertheless valid. (l)

But the twenty-third section enacts, that where any valid marriage of a minor by license shall be procured by the wilfully false oath of either party; or if any valid marriage of a minor by banns shall be procured by a party thereto, knowing the want of consent of the parent or guardian of such minor, and knowing that banns had not been duly published; such parent or guardian may sue for a forfeiture of all interest in any property accruing to the offending party by force of such marriage: and provision is made for the settlement of such property, for the purpose of preventing such party from deriving any pecuniary benefit from such marriage.

No consent has ever been required to marriages by banns; but the clergyman is punishable by ecclesiastical censures for solemnizing the marriages of minors, where he has notice of the dissent of the parents [ \*289 ] or guardians: and if such dissent is openly \*declared in the church or chapel where the banns are published at the time of publication, such publication of banns is absolutely void. (n)

By the new Marriage Act, the like consent is required to any marriage solemnized by license as would have been required by law to marriages solemnized by license immediately before the passing of the act: and every person whose consent to a marriage by license is required by law, is authorised to forbid the issue of the superintendent registrar's certificate, whether the marriage is intended to be by license or without license; and in case the issue shall have been so forbidden, the notice and all proceedings thereupon are void. (n)

One of the parties intending a marriage by license under the act must swear or affirm that the consent, where necessary, has been obtained, (o) and though a false declaration does not avoid the marriage, it exposes the party both to the penalties of perjury and to the forfeiture of property accruing from the marriage, as in the 4 Geo. 4, c. 76. (p)

(l) *Rex v. Birmingham*, 8 B. & C. 35, (15 E. C. L. R.)

(m) 26 Geo. 2, c. 33, s. 3. 4 Geo. 4, c. 76, s. 8.

(o) Sect. 12.

(n) 6 & 7 Wm. 4, c. 85, ss. 9, 10.

(p) Sects. 38, 43.

It is not necessary in support of marriages under the act, to give any proof of consent, and no evidence can be given to prove the contrary in any suit touching the validity of such marriages.(g)

II. Before Lord Hardwicke's Act, the celebration of marriage in any other place than a church or chapel of the establishment, exposed the parties and minister to censure and punishment, but did not avoid the marriage. But by the eighth section of that act, all marriages in any other place than a church or public chapel where banns had been usually published unless by special license were null and void.

The Court of King's Bench held that this section referred only to chapels in which banns had been usually published at the [ \*290 ] passing of the act, and therefore ruled that a marriage was void which had been celebrated in a chapel erected since that time.(r)

In consequence of this decision the statute 21 Geo. 3, c. 53, was passed, which rendered valid marriages which had been celebrated in any parish church erected and consecrated since the 26 Geo. 2, c. 33. This statute was merely retrospective, and the statutes 44 Geo. 3, c. 77, and 48 Geo. 3, c. 127, confirmed marriages which had been solemnized before the respective times when the acts passed in churches and chapels erected and consecrated since the 26 Geo. 2, c. 33, and to which the preceding statutes did not extend.

By the 4 Geo. 4, c. 76, the first cause of nullity is knowingly and wilfully intermarrying, (unless by special license) in any other place than a church or such public chapel wherein banns may be lawfully published.(s)

The bishop of the diocese, with the consent of the patron and incumbent, may authorise the publication of banns and the solemnization of marriages in public chapels, and such consent and written authority is to be registered in the registry of the diocese. Notices are to be placed in such chapels expressing that banns may be published and marriages solemnized therein, and with respect to registers such chapels are placed on the same footing as churches.(t)

Parishes not having any church or chapel, and extra-parochial places not having chapels in which banns may be published, are to be deemed to belong to any adjoining parish or chapelry.(u) When a church or chapel is disused for public service, from being under repair or from being taken down to be rebuilt, the banns may be published in a church or chapel of any adjoining parish or chapelry, or in any place within the parish or chapelry licensed by the bishop for the performance of divine service; where no such place shall be licensed, the marriage may be solemnized in \*such adjoining [ \*291 ] church or chapel: and marriages theretofore solemnized in other places on account of the church or chapel being under repair, or taken down to be rebuilt, shall not on that account have their validity questioned.(v)

The last clause of this section being merely retrospective, and it being doubtful whether it extended to marriages by license, it was enacted by 5 Geo. 4, c. 32, that marriages theretofore or thereafter

(g) Sect. 25.

(s) Sect. 22.

(t) Sects. 3, 4, 5.

(r) *Rex v. Northfield*, Dougl. 659.

(u) Sect. 12.

(v) Sect. 13.

solemnized in places so licensed during the repair or rebuilding of any church or chapel, or if no such place shall be so licensed, then in a church or chapel of any adjoining parish or chapelry, whether by banns or license, shall not therefore have their validity questioned.

The statute 6 Geo. 4, c. 92, renders valid all marriages which had at that time been solemnized in any church or public chapel erected and consecrated since the statute, 26 Geo. 2, c. 33, and makes it lawful to solemnize and renders valid marriages in all such churches and chapels in which it had been customary and usual before the passing of the act (5th July, 1825) to solemnize marriages.

The statute 11 Geo. 4, c. 18, provides for the validity of marriages, the banns whereof have been published in any place used for the performance of divine service within any parish or chapelry during the repairs or rebuilding of the church or chapel thereof, and solemnized in such place, or in the church or chapel of the same or an adjoining parish or chapelry.

The 2nd section enacts that a consecrated chapel licensed by the bishop for the purposes of marriages during the repair or rebuilding of the church, shall for such purposes be deemed the church. Section 3, declares the validity of marriages solemnized in churches erected under the statutes 58 Geo. 3, c. 45, and 59 Geo. 3, c. 134. By the 4th and 5th sections the validity is not to be questioned of marriages which had been solemnized, or the banns of which had been published [ \*292 ] in chapels duly \*consecrated, but not legally authorized for that purpose, and notwithstanding the uncertainty respecting the consecration of such chapels.

The recent marriage act provides places in which marriages may be solemnized without conformity to the rites of the Church of England. These are places of worship registered under the following provisions and offices of superintendent registrars.

Any proprietor or trustee of a separate building certified according to law as a place of religious worship, or of any building licensed and used exclusively as a Roman Catholic chapel for one year, (w) shall deliver to the superintendent registrar a certificate signed by twenty householders, that such building has been used by them during one year at least as their usual place of religious worship. The building is then registered both at the general register office and at the superintendent registrar's office, and notice thereof is advertised in a local paper, and in the London Gazette. (x) Upon disuse of the building as a place of worship, the registry is to be cancelled, and upon removal of the congregation to a new place of worship, the latter may be substituted by the registrar general for the disused building, the cancel and substitution being also advertised as before. (y)

Marriages may be solemnized in such registered buildings between parties described in the notice and certificate given under the act, according to such form and ceremony as they may see fit to adopt, making however the declaration and using the form of words provided by the act. (z)

(w) 1 Vict. c. 22, s. 35.

(x) 6 & 7 Wm. 4, c. 85, s. 18.

(y) Ibid. s. 19.

(z) 6 & 7 Wm. 4, c. 85, s. 20. The declaration may be in Welsh, 1 Vict. c. 22, s. 23.

Persons objecting to marry under the act in any such registered building may, after notice and certificate, contract and solemnize marriage at the office of the superintendent registrar, making the declaration and using the form of words aforesaid.(a)

The act also facilitates the licensing of chapels of the [ \*293 ] establishment for the solemnization of marriages. The bishop of the diocese, with the consent of the patron and incumbent of the parish church, or without such consent after two months' notice by the registrar to the patron and incumbent, may authorize by license the solemnization of marriages in chapels for persons residing within a district the limits whereof shall be specified in the license: and thenceforth and until the license be revoked, marriages so solemnized shall be valid.(b) And by the stat. 1 Vict. c. 22, ss. 33 and 34, it is provided that banns may be published in chapels licensed by the bishop, and that marriages may be solemnized in licensed chapels though only one of the parties resides in the district: but in such case the banns are to be published in the church or chapel of the district where each of the parties resides.

Lists of all chapels wherein marriages may be solemnized according to the rites of the Church of England, and of all registered buildings and the registrar's district of each, and the names and places of abode of the registrars and deputy registrars of each district, and of superintendent registrars are to be annually made out and printed, and a copy sent by the registrar-general to every registrar and superintendent-registrar.(c)

Besides these statutes, in some local acts for erecting churches and chapels provisions have been made in regard to fees for and other matters relating to christenings, marriages and burials: and these have been sometimes considered as giving an implied power to celebrate marriages and recognizing the validity of those which might be celebrated in such churches or chapels.(d)

The statutes both of the 26th George the 2nd, c. 33, and of the 4th of George the 4th, c. 76, direct that the marriage shall be solemnized in the church where the banns have been published, but do not expressly annul a marriage solemnized in another church. The question of the validity of such a marriage arose under the old act, but was not decided, the marriage in the particular case being held valid on account of the church where the publication should [ \*294 ] have taken place being under repair and shut up at the time.(e)

But marriages knowingly and wilfully celebrated under the recent Marriage Act in any place other than the church, chapel, registered building or office or other place specified in the notice and certificate, are void. There is, however, a saving of the validity of marriages legally solemnized according to the 4th Geo. 4, c. 76.(f)

In the case of marriages in chapels it does not appear to have been held necessary, except in actions for criminal conversation (to which may perhaps be added trials for bigamy,) to shew that the chapel was one in which banns might be published and marriages solemn-

(a) 6 & 7 Wm. 4, c. 85, s. 21.

(c) Sec. 34.

(e) *Stallwood v. Tredger*, 2 Phill. 287, (1'E. Ecc. R.)

(b) Sec. 26, et seq.

(d) See 1 Evans stat. 155, n.

(f) 6 & 7 Wm. 4, c. 85, s. 42.

nized.(g) But it is of course competent to the other party to show that the chapel was not one of this kind.

By the old as well as by the existing Marriage Acts(h) the power of the Archbishop of Canterbury is preserved to grant special licenses to marry at any convenient time and place. And the marriages of the Royal Family and of Jews and Quakers have always been and are still exempt from any of the foregoing restrictions as to the place of solemnization.(i)

The question appears to be open to discussion whether marriages in the chapels of Foreign Ambassadors in England are not exempt from the operation of the several Marriage Acts. In the case of *Per-treis v. Tondear*(j) which took place after the first Marriage Act, the marriage was solemnized in the chapel of the Bavarian ambassador without banns or license. The husband was of the suite of the Spanish Ambassador, but the woman, who was a foreigner and had been resident for four months only in England, did not appear to belong [ \*295 ] to the household of any \*Ambassador. It was contended that an Ambassador's house and chapel was to be considered as part of the country to which he belonged and that the Marriage Act was therefore inapplicable. On the other side, besides the general words of the act, a case(k) was relied on where, it was said, a marriage solemnized in the house of the Venetian Ambassador was declared null. Lord Stowell said it had perhaps never been formally decided that the supposed privilege in Ambassadors' chapels existed; if it did he thought it difficult to bring this case within it, neither of the parties belonging to the country of the Ambassador,(l) and the woman, who did not appear to have been living in a house entitled to the privilege, having been long enough in England to acquire a matrimonial domicile.

Lord Stowell's opinion seems from a subsequent case(m) to have been in favour of the existence of the privilege: and perhaps on principles of international law it may be thought that the alleged exemption rests on the same footing as the exemption from the *lex loci* of marriages in the chapels of British Ambassadors abroad, which, according to Lord Ellenborough,(n) is established in England because it is allowed in the country of the marriages.(o) It is to be observed that under the present acts the marriage is void only in cases where the parties *knowingly and wilfully* intermarry in an unauthorized place and manner; and therefore if parties married in an ambassador's chapel acted *bonâ fide*, there would be reason to contend that the clause of nullity did not apply, and the case would then be remitted to the marriage law independently of the acts, by which law the marriage would be valid.

III. Those parts of Lord Hardwicke's Act which either impliedly (by providing that the rules prescribed by the rubric in the solemnization of matrimony shall be duly observed) or expressly refer to the

(g) See *Taunton v. Wyburn*, 2 Camp. 297.

(h) 26 Geo. 2, c. 33, s. 6. 4 Geo. 4, c. 76, s. 20.

(i) 6 & 7 Wm. 4, c. 85, ss. 2, 45.

(j) 1 Hagg. C. R. 136, (4 E. Ecc. R.)

(k) *Hienel v. Fierville*, 1783.

(l) See *Lacy v. Dickinson*, 1 Hagg. C. R. 386 n. (4 E. Ecc. R.) 1 Esp. N. F. C. 353.

(m) *Ruding v. Smith*, 2 Hagg. C. R. 386, (4 E. Ecc. R.)

(n) 10 East, 286.

(o) See post, c. 4, s. 3.

presence of a minister at marriages are directory only, and a marriage without such presence is not therefore void under that act.

\*But by the 4th of Geo. 4, c. 76, if the parties knowingly and wilfully consent to or acquiesce in the solemnization of their marriage by any person not being in holy orders, the marriage is void. [ \*296 ]

Under the New Marriage Act the presence of some registrar of the district is required where the marriage is in a registered building; and the presence of such registrar and also of the superintendent registrar is required when the marriage is in the superintendent registrar's office.(p) And if persons knowingly and wilfully intermarry in the absence of a registrar or superintendent registrar where their presence is necessary under the act, the marriage is void.(q)

The presence of two witnesses is required by Lord Hardwicke's Act as well as by the existing acts, but the requisition is not enforced by any clause of nullity.

Such being the statute law on clerical and other intervention and presence at marriage, it becomes important to inquire whether by the general law prevailing before and viewed apart from the Marriage Acts the presence of a priest was essential to the constitution of the contract. Upon this question depends the validity of marriages without clerical ministration which took place before 1754, or (as Lord Hardwicke's Act was not introductive of any new rule on the subject) since that period and before 1823, if the solemnities made essential by the act were observed: and of those solemnized by a layman believed by either of the parties to be a clergyman, subsequently to 1823, and not under the New Marriage Act; and also of marriages in Ireland and most of the British colonies and settlements, and, under some circumstances, of British subjects in foreign countries, to which clerical intervention was wanting. The question also respects the validity of marriages excepted from the Marriage Acts, namely, those of the Royal family, of Quakers, and of Jews; and it derives interest and importance from the recent statute admitting of the solemnization of marriages before a civil officer.

\*A respectable opinion has been advanced and elaborately and ably maintained, that according to the law [ \*297 ] administered in England before Lord Hardwicke's Act, the effects of marriage were denied to a matrimonial contract not solemnized in the presence of a person in holy orders and that (in particular and confining the conclusion arrived at to the subject of this work) it did not confer upon the issue the rights of legitimacy.(r) The authorities relied upon in support of this opinion with several others will be examined in the following pages, and it will be submitted that they lead to the contrary conclusion that such unsolemnized contract in terms of present matrimonial consent was a valid marriage for the purpose of rendering the issue legitimate. A long-obsolete exception may however be admitted in the outset as having existed in cases where general bastardy was objected to a party to a real action, and where by reason of the want of *lawfulness* of his parents' marriage he was

(p) 6 & 7 Wm. 4, c. 85, ss. 20, 21.

(q) Ibid. a. 42.

(r) Mr. Jacob's *Addenda to Roper's Husb. & Wife*, vol. 2, p. 445.



certified to be a bastard by the Spiritual Court. This exception had, as it will be seen, become unimportant even before the abolition of real actions, but a notice of it will serve to prove the rule.

The canon law is the acknowledged basis of the matrimonial law of England, as it is of that of all Europe: and at the reformation, though the doctrine of a sacrament in marriage was disclaimed in this country, the rules of the canon law with reference to the matrimonial contract were retained.<sup>(s)</sup> Since that period the question is how far they have been receded from by the laws of any particular country,<sup>(t)</sup> and the principle applied by Lord Stowell to the Scotch matrimonial law may be considered equally applicable to the English: "where it is not proved that it has resiled from the canon law the fair presumption is that it continues the same. Show the variation and the court must follow it, but if none is shewn, then must the court lean upon the doctrine of the ancient general law."<sup>(u)</sup>

It is therefore necessary to inquire first what the canon law was [ \*298 ] upon the constitution of the matrimonial contract, and secondly \*in what particulars that law has been departed from by the law of England.

The doctrine of the canon law was, in Lord Stowell's words, that "a contract *per verba de presenti* or a promise *per verba de futuro cum copulâ* constituted a valid marriage without the intervention of a priest, till the time of the Council of Trent, the decrees of which council were never received as of authority in this country."<sup>(v)</sup>

Some misapprehension has arisen from the use of the word *sponsalia*, as applied to contracts *de presenti*, upon which Lord Stowell remarks: "The consent of two parties expressed in words of present mutual acceptance, constituted an actual legal marriage, technically known by the name of *sponsalia per verba de presenti*, improperly enough, because *sponsalia* in the original and classical meaning of the word are preliminary ceremonials of marriage: and therefore Brower justly observes, *jus pontificium, nimis laxo significatu imò etymologiâ invitâ, ipsas nuptias sponsalia appellavit*."<sup>(w)</sup> The expression, however, was constantly used in succeeding times to signify clandestine marriages, that is, marriages unattended by the prescribed ecclesiastical solemnities; in opposition, first, to regular marriages; secondly, to mere engagements for a future marriage, which were termed *sponsalia per verba de futuro*."

The different legal views taken of these three: regular marriages, irregular marriages, and mere promises or engagements, are thus clearly and felicitously stated: "In the regular marriage, every thing was presumed to be complete and consummated, both in substance and in ceremony. In the irregular marriage, every thing was presumed to be complete and consummated in substance, but not in ceremony; (x)

(s) Dalrymple v. Dalrymple, Dodson's Report, p. 16. 2 Hagg. C. R. 54, S. C., (4 E. Ecc. R.) (t) Per Lord Eldon, 1 Dow. 181.

(u) Dalrymple v. Dalrymple, p. 32.

(v) Dalrymple v. Dalrymple, Dodson's Report, p. 33.

(w) Bracton, fol. 417, says that the form of objecting bastardy in a real action was: *quia natus fuisti ante sponsalia vel matrimonium contractum inter patrem tuum et matrem tuam*.

(x) According to Selden, by the Jewish law, *per sponsalia fuit verè uxor, per nuptias perfectè*. Uz. Eb. lib. 2, c. 1, 13.

and the ceremony was enjoined to be undergone as matter of order. In the promise, or *\*sponsalia de futuro*, nothing was presumed to be complete or consummated either in substance [ \*299 ] or in ceremony. Mutual consent would release the parties from their engagement, and one party without the consent of the other, might contract a valid marriage regularly or irregularly with another person; but if the parties who had exchanged the promise had carnal intercourse with each other, the effect of that carnal intercourse was to interpose a presumption of present consent at the time of the intercourse, to convert the engagement into an irregular marriage, and to produce all the consequences attributable to that species of matrimonial connection.”(y)

Lord Stowell is charged(z) with giving in this judgment the title of marriage to what was technically known under the name of *sponsalia*, and with referring more to that which constituted the *vinculum*, than to that which was essential to make the marriage in all respects complete. In attributing to the Council of Trent the rule requiring the intervention of a priest, it is alleged that his lordship “could only be understood to refer to the decree having made that intervention necessary to form the *vinculum*,” the opinion that it was necessary to form a perfect marriage having prevailed long before;” that “previous to the date of that council the rule was understood to exist in England, and that its existence can only be ascribed to doctrines of the church originating at an earlier period.”

The most obvious authorities in the canon law shew that there is no warrant for this impeachment or for this construction of Lord Stowell’s judgment. Those which are referred to in that celebrated decision, need not be here re-examined. Swinburne only echoes their constant burden, *solus consensus facit matrimonium*, when he says, it is a present and perfect consent the which alone maketh matrimony, without either public solemnization or carnal copulation; for neither is the one nor the other the essence of matrimony, but consent only.(a)

The non-essentiality of clerical intervention by the canon-law appears \*both from the necessity of the change of law by [ \*300 ] the Council of Trent and from the language of the decree effecting that change. “Though there is no question,” it commences, “that clandestine marriages made with the free consent of the contracting parties are true and valid marriages so long as the church does not make them null, yet the holy church has always for very just reasons detested and forbidden them. But the holy council perceiving that these prohibitions are not now of any use by reason of the disobedience of mankind doth ordain,” &c.(b)

Selden, with ready learning, discloses the most probable origin of the practice of clerical ministration in matrimony. The contract (his language may be rendered) was constituted by the contractors alone,

(y) Dalrymple v. Dalrymple, Dr. Dodson’s Report, p. 14.

(z) 2 Roper’s H. & W. 472.

(a) Espousals, s. 4, and see Wood’s Institutes, p. 57.

(b) Dupin Eccl. Hist. 4, c. 20. Fides catholica est, matrimonia clandestina ante concilium Tridentinum fuisse valida. Et ratio est, quia quoties concurrunt essentialia, contractus validus est, licet desiderantur solemnitates extrinsecæ et accidentales; in matrimonio autem clandestino concurrunt tota matrimonii essentia, deficiente sola extrinsecæ publicitatis solemnitate. Sanchez de Matr. Disp. 1.

without the ministration or intervention of bishop or priest : afterwards he was wont to be present, *sacrorum gratiâ*, along with other persons whose presence was required, lest the matrimony should be clandestine. So we every where read that sales, adoptions, manumissions, gifts, &c., were formerly made at the altar in the presence of the priest, and solemn benedictions were used in not a few civil and legal transactions ; whence, however, it by no means follows that this ministration was requisite to the substance of the act.(c)

After an examination of the opinions of the fathers and of the decrees of councils (which so far from warranting shew the incorrectness of the notion that before the Council of Trent an opinion had been adopted in the church, that the sacerdotal benediction was essential to render the *contract* complete,)(d) Selden concludes that the solemnities, although in prevalent use in the Christian Church, were not held so necessary that without them matrimony constituted by free consent was esteemed of no force, or null, or *not plainly valid*.(e)

[ \*301 ] \*By the canon law, the *solemnization* of marriage was prohibited during considerable portions, amounting together to about one-third of the year.(f) This prohibition was positive, and not merely directory, like that which prescribed the publication of banns. Lyndwood, in his gloss upon the word "*solemnizationem*," in Archbishop Mepham's Constitution of 1328, says, that solemnization ought not to be had (*non debet fieri*) without publication of banns ; and cannot be had (*non potest fieri*) within the prohibited times.(g) But the prohibition respected the celebration only, and not the constitution of matrimony. Thus Durand says, that although the solemnity of nuptials was interdicted during these periods, yet matrimony was at any time lawfully contracted *per verba de presenti*.(h) The Manual according to the use of Sarum expresses the same doctrine in terms which distinguish the matrimony thus contracted from espousals, and also exclude the notion that although private it must have taken place in the presence of a priest.(i)

The sacerdotal benediction is spoken of by the canonists as one of those solemnities attending a regular marriage, the omission of which subjected the parties to censure, but did not invalidate the act. Two of the commentators on the Decretals treat it as being required in the same manner as banns, not of necessity, but for the sake of decorum.(j) And the language of the Decretals themselves is inconsistent

(c) Ux. Eb. lib. 2, c. 28.

(d) 2 Roper, 470.

(e) Ux. Eb. lib. 2, c. 28. He elsewhere observes that even since the Council of Trent, eminent theologians and lawyers have held that it was sufficient if the *parochus* be present at the marriage, though he be not yet *sacerdos seu presbyter*. Ux. Eb. lib. 2.

(f) These prohibited times were from the first Sunday of Advent to the octaves of the Epiphany, from Septuagesima Sunday to the first Sunday after Easter, and from the first Rogation Day to the seventh day after Pentecost. Selden, (Ux. Eb. lib. 2, c. 30,) says that in his time no one could celebrate nuptials within these periods without the bishop's dispensation.

(g) Provinciales, p. 274.

(h) *Licet autem solemnitas nuptiarum premisis temporibus interdicta sit, quocumque tamen tempore matrimonium legitime per verba de presenti contractum est.* Durand, *Rationale Divinorum Officiorum*, lib. 1, c. 9, n. 8.

(i) *Sciendum est quod licet omni tempore possunt contrahi sponsalia, et etiam matrimonium quod fit privatim, solo consensu, tamen traditio uxorum et nuptialis solemnitas certis temporibus fieri prohibentur.* Selden, Ux. Eb. lib. 2, c. 30, citing *Manuale secundum usum Sarum*, fol. 33.

(j) John Andreas and Hostiensis. The latter says, *benedictio et banna sunt solemn-*

with any other doctrine. Thus it is said if persons marry contrary to the special interdict \*of the church (and from such a marriage it seems clear that the clerical ministration [ \*302 ] would be withheld) the penance is arbitrary, but the marriage holds.(k) It would further appear that at one time in the church the celebration by the priest was denied to those entering into a second marriage, yet there seems to have been no doubt of its legal validity.(l)

Our provincial constitutions shew that the same law prevailed in England. Contracts of matrimony wanting in any of the ecclesiastical solemnities were in the language of Lord Stowell frowned upon by the church, which at the same time by the very care taken to discountenance and punish them, admitted their legal force.(m) In some constitutions publication of banns and due solemnization in *facie ecclesie* are strictly prescribed;(n) and in others the clergy are directed to enjoin the people to abstain under pain of excommunication from contracting matrimony otherwise than publicly before witnesses (not because that was necessary to their validity, but) in order that proof of them might be afterwards forthcoming.(o) So Lyndwood, after saying that if marriage was clandestine and irregular, the parties were punishable, adds that the marriage was nevertheless good.(p) And therefore cohabitation after a contract *de presenti* but before solemnization was punishable, not as fornication, but as a contempt of the laws of the church.(q)

It thus appears that the principle of the sufficiency of \*unsolemnized contracts to constitute matrimony was left [ \*303 ]. untouched by the ecclesiastical rules prescribing banns, benedictions, and solemnization in *facie ecclesie*. The non-observance of these subjected the parties concerned to ecclesiastical censure, but did not affect the validity of the contract. The marriage was clandestine, irregular, and uncanonical, but nevertheless valid. There was an offence committed against public order, but the contract was binding, and the parties were very husband and wife with respect of the substance and indissoluble knot of matrimony:(r) and accordingly subsequent carnal intercourse by either with a third person, even after marriage solemnized with that person, was punishable as adultery.(s) Such was the view taken by the canon law itself with all its attachment to ecclesiastical forms.(t)

itates, quæ requiruntur honestatis non necessitatis, causâ. Summa tit. de Cland. in s. quot modis. And see Sanchez de Matr. lib. 3, disp. 1, et seq.

(k) Decretal. lib. 4, tit. 16.

(l) Barosa Collectanea, tom. 5, p. 378. Selden Ux. Eb. lib. 2, c. 296. Cardinal Bellarm. in, lib. 2, de Concil. c. 8, says, that the canon law did not prohibit second matrimony, but only the solemnities of matrimony to which belonged the name of nuptials.

(m) Zouche's Constn. of 1347. Lyndw. Prov. Const. (n) Lyndw. 371. 2 Atk. 669.

(o) One of Walter in 1322 is as follows: Prohibeant etiam presbyteri frequenter matrimonium contrahere volentibus sub pœna excommunicationis ne dent sibi fidem mutuo de matrimonio contrahendo nisi in loco celebri, coram publicis et pluribus personis ad hoc convocatis. Another of Archbishop Bourchier in 1455 runs thus: Injunctis insuper utriusque sexûs viris ac mulieribus, ne mutuo fidem dent de matrimonio contrahendo, aut matrimonium quoquo modo contrahant nisi in presentia duorum aut trium testium idoneorum, per quos matrimonium hujusmodi si quando, inimico homine procurante, id per aliquem contrahentium denegari contingat, luculentur probari possit. Gibson's Cod. p. 501.

(p) Prov. of Stratford's Constn. of 1343. (q) Moore, 170. 6 Mod. 155. 3 Lev. 376.

(r) Swinburne, s. 4.

(s) Ibid.

(t) Per Lord Stowell, 1 Hagg. C. R. 229, (4 E. Ecc. R.)

At the common law it must be admitted that several of the consequences of matrimony were at one time denied to any other than regular or lawful marriages. Those contracted otherwise than in *facie ecclesiæ* are pronounced invalid by Bracton.<sup>(i)</sup> So Fitzherbert says that a woman married in a chamber shall not have dower by the common law.<sup>(v)</sup> Two cases also are recorded which establish that at one period the issue of private marriages were for some purposes illegitimate. The first, which is known as Foxcroft's case, occurred in 10 Edw. 1. The report is thus literally rendered: One R. being sick and in his bed, was married to A., a woman, by the bishop of London privately, in no church or chapel, nor with celebration of any mass, the said A. being then pregnant by the said R., and then within twelve weeks after the marriage the said A. was delivered of a son: and adjudged a bastard, and thus the land escheated to the lord by the death of R. without an heir.<sup>(w)</sup> In the second case, which was in 34 Edw. 1, John had lived in concubinage with Katherine, and had two children by her, and afterwards fell sick, and was in danger of death, when the vicar of Plumstede advised him *pro salute animæ suæ* to marry Katherine; whereupon, in his own house [ \*304 ] and before the vicar, he espoused her, placed the ring upon \*her finger, and pronounced the accustomed words in contracting matrimony, but being unable to go to church there was no celebration of mass. Thenceforth during his whole life he held the said Katherine for his wife. Upon his death a son, William, born after the marriage, claimed his father's lands against his father's brother. But it was found by assize that John had never espoused Katherine in *facie ecclesiæ*, *per quod sequitur* that William could claim nothing of right in the tenements, but was in mercy for false claim.<sup>(x)</sup>

It is to be observed that neither of these cases is any authority for the essentiality or efficacy of clerical ministration, which was rendered in both instances; and the cause of the invalidity of the marriages was the more general one of the want of solemnization in *facie ecclesiæ*.

This state of the law may be referred to two causes. First, that desire, originating in the dearth of written evidence, to insure publicity in transactions affecting the titles to lands, which is everywhere visible is the ancient modes of assurance and trial. Secondly, the position of the Temporal Courts with relation to the Spiritual in the matters of marriage and legitimacy. The disputes which led to the repudiation by the statute of Merton of the canonical doctrine of legitimation by subsequent marriage indicate, and no doubt were also productive of jealousy and distrust between the two jurisdictions. The canonists recognizing the validity both of regular and of irregular marriages, the former being in their nature public and easily proved, the latter clandestine and depending upon what might be considered to amount to *verba de præsentî*, it is reasonable to believe that the Temporal Courts feared lest the ecclesiastics might indirectly and

(u) Fol. 92 302 b.

(v) F. N. B. 150 n. citing H. 16 H. 3.

(w) 1 Roll. Ab. 359.

(x) Case of Del Heith, cited by Nicolas, Adult. B. 567, from Harleian MS. 2117, fol. 339.

by constructively elevating concubinage into marriage, effect that which they had been prevented from doing openly by giving marriage a retrospective operation; and therefore so worded their writs to the bishop as to give him jurisdiction to inquire and certify not whether there was a marriage, or whether the party was a bastard, but whether there \*was lawful or regular marriage, and [ \*305 ] whether the party was born in or after lawful matrimony.(y) Their object was thus gained: the only marriages which could be regarded were those whose publicity made the time of their occurrence of easy proof; for the bishop could not certify that to be lawful matrimony which was a violation of ecclesiastical rule, and subjected the parties to excommunication and other punishment.

But this strictness afterwards wore away and had been departed from as early as the time of Britton.(z) This writer puts the case of a man and woman having three sons, one born whilst they lived in concubinage, another after private espousals, and the third after solemn espousals at the church door. To the question which of the children should succeed to the father's inheritance he answers the second; assigning as a reason that the son could aver that he was born within espousals, it being immaterial whether the espousals were solemn or private. He adds, however, that the mother's right of dower depended wholly on the third marriage;(a) and thus recognizes the principle, which it will be seen has subsisted down to modern times, and the want of attention to \*which has unneces- [ \*306 ] sarily embarrassed the whole question—that a marriage valid to confer legitimacy upon the offspring, might yet be invalid to impart rights to the parties themselves, such as that of dower to the wife. The preference of the second son to the first shews that nothing turned upon the retrospective effect of the regular marriage, or that partial allowance of the doctrine of relation which was made by the rule of *bastard eigne* and *mulier puisne*.

No mention is made in either of these cases of the presence of a priest: the parties are said to have been "privily espoused;" there

(y) See 2 Prynne's Records, 411.

(z) Who is supposed to have lived temp. Ed. 2. Mr. Jacob cites from 4 Vin. Ab. 38, pl. 21, a case in 10 Ed. 4, in which the issue of an unsolemnized marriage is said to have been adjudged illegitimate. But upon consulting the references in Viner it clearly appears that 10 Ed. 4, is a misprint for 10 Ed. 1, and that the case cited is Foxcroft's case.

(a) The following is a close translation: "If a man keeps a woman in concubinage and has a child of her, and then espouses her privily elsewhere than at the church door, and then in such private espousals has a child of her, and then solemnly espouses her at the church door and there endows her, and then has another child of her, which child is to be received to the succession of the father's inheritance? In such a case answer is to be made that the *middle* son ought to be received to the succession of the inheritance of his father, [en tel cas, fait a respondre q' l' mulveyn fitz doit ee rescou a la succession del heritage a pierre, &c.,] and be counted for mulier, notwithstanding that the espousals were private, inasmuch as in right of his birth he can yet aver that he was born within espousals, whether the espousals were made solemnly or privily." After observing that the mother would have dower by reason of the solemn espousals, he continues, "It thus appears and is true that the mother would have had no dower *although her son was receivable to the succession of his father's inheritance*, and that there never would have accrued a right to demand dower if the title to it had not been given to her at the door of the church, whether that was done in time of interdict or at another time." Britton, c. 107. In the 44 Ed. 3, the law had been settled in conformity with the doctrine of Britton; for in a case of bastardy in that year, the marriage appeared to have taken place when the father was on his death-bed, yet its validity was not questioned. Y. B. 44 Ed. 3, pl. 21. H. 45. Ed. 3, pl. 45.

might or might not have been clerical ministration: if there was not, *cadit quæstio*; if there was, an inference from its not being mentioned was unimportant.

The change thus apparent in the law was, it is apprehended, from the general requisition of a regular or canonical marriage to the allowance, except in cases where the lawfulness could be put in issue, of the sufficiency of that which although defective in matter of ecclesiastical form was a valid marriage by the law administered in the Spiritual Courts. The contrary line of argument proceeds on the supposition that, dismissing as unimportant all the other prescribed formalities of a regular marriage, the common lawyers retained and cherished clerical intervention as the only thing needful to valid matrimony.

Of the several parts of the complete ecclesiastical ceremony, this is, *a priori*, the least likely to have been the object of such preference. Publicity was not secured by it, or at least not in a degree worth consideration, or to be compared to that which arose from banns or an observance of the prescribed place of solemnization: and any advantage of this kind was outweighed by the circumstance that the sacerdotal ministration might be granted or withheld at the pleasure of the church; and was in fact denied during periods of considerable length and frequency. The doctrine of its essentiality is for the latter reason opposed by the strongest arguments: *ab inconvenienti*. These do not merely rest on the grievance if, during considerable portions, amounting to one-third of every year, the power was denied to the [ \*307 ] people of contracting such matrimony as would make the offspring legitimate. \*Besides these annual times of prohibition there were occasionally much longer ones co-extensive in duration with the interdicts to which the kingdom or parts of it were from time to time subjected, and during the subsistence of which the ecclesiastical solemnities of marriage were altogether withheld from the people. The interdict in the reign of John lasted six years and three months, and it is stated that during all this space there were neither divine services, *sacraments* nor Christian burial.(b) It surely is not to be supposed that marriages were suspended during this period, or that all which are assignable to it are void and the issue illegitimate. Recollecting the justifiable jealousy which the Temporal Courts entertained of Ecclesiastical authority, we cannot believe that they ever admitted a doctrine of which it was a necessary consequence that the pope possessed and exercised the power (and that of the gift of the common law, the church holding the sufficiency of unsolemnized contracts) of closing and opening at his pleasure the fountain of legitimate succession throughout this kingdom.

The authorities do not leave this entirely to inference. Britton alludes to espousals and endowments at the church door during the time of interdict, in a manner which shows that notwithstanding the absence of the other solemnities, a wife so married and endowed was entitled to dower.(c) An observance of the accustomed place of

(b) 2 Prynne's Records, 255. 333. Instances of the rigid denial during interdicts of all clerical offices to the laity may be seen in other parts of the same volume. See Index, tit. Interdict.

(c) Cap. 107, cited ante, p. 305 n.

solemnization, was, however, for this purpose essential; and herein it will be remarked that the common lawyers took care to require that conformity only to the regular order of marriage, which both secured publicity, and could be observed at all periods, whether the church granted or denied its offices. It appears from the ancient rituals, that it was at the church door, a place of public passage or free resort, that the civil part of the ceremony, both espousals and endowments, took place; and that the parties (already designated husband and wife) then entered the church, where the religious ceremony was superadded. The words of the Romish ritual, as cited by Selden, (d) are, *Postquam fuerit mulier viro desponsata, et legaliter dotata, \*introsat cum marito ecclesiam, et prostulit eis, &c.* [ \*308 ] So in the Manual according to the use of Sarum, it is said that the parties standing before the door of the church, the dower of the wife was to be bestowed, and the ring was to be given, which was commonly called *desponsatio*; and that they were then to enter the church and receive benediction. (e) The allusions of other writers show that the essential part of the ceremony took place at the church door. (f)

But it is particularly to be observed (for the fact is a key to several authorities which have been misapplied) that in certain cases, either where the lawfulness of marriage was at issue, or where the Ecclesiastical Courts, in questions within their original jurisdiction, considered themselves bound to discountenance offences against the laws of the church, a canonical or lawful marriage alone would suffice. In dower or appeal, the form of joining issue on the marriage raised the question whether the party had been lawfully married, and the writ was thus worded to the bishop, who then could only certify in favour of that which by the canon law was *legitimum matrimonium*. Some relaxation, however, took place as to this species of matrimony, it becoming no longer necessary that the solemnization should be at a church. (g) This is attributable to the practice and increasing facility of obtaining licenses to solemnize marriages in private houses, or absolution for the parties, whereby such contracts were purged of their irregularity, and raised to canonical marriages. These licenses and absolutions became very common, (h) and probably of course; and an observance of the place of solemnization at length ceased to be considered essential, even to lawful matrimony. There [ \*309 ] is, however, some warrant for the opinion that in later times it was held, at least in the Spiritual Court, essential to lawful marriages that there should have been banns or license, in conformity to the English ritual. (i)

(d) *Ux. Eb. lib. 2, c. 27.*

(e) *Ibid.*

(f) Littleton, a. 39, speaks of a man coming to the church door to be married, where, after affiance and troth plighted between them, he endoweth the woman, &c. And Lord Coke upon the passage, without professing to contradict Littleton, says that dower *ad ostium* was ever after marriage solemnized; thus treating as complete marriage that which passed at the door. *Co. Litt. 34 a.* So Chaucer says of the wife of Bath; "Housbondes at the chirche dore had she had five;" and see other notices of the practice. Hearn's *Antiq. Glastonbury*, App. p. 310. Selden says, *tunc igitur ad ostium ecclesie, nec interius, sponsalia iniri solita.* But even in his time both espousals and endowments at the church door had fallen into desuetude. *Ux. Eb. lib. 2, c. 27.*

(g) Perkins, 306.

(h) Gibson's *Cod. 425.*

(i) *Scrimshire v. Scrimshire*, post, p. 310.



The insufficiency of unsolemnized contracts to confer upon the wife the right to dower explains the case put by Perkins of a man contracting matrimony with J. S., and dying before marriage solemnized, when she shall not have dower, for she never was his wife; that is, *quoad* dower. The case which Lord Hale states(*j*) is of the same kind; and when he says, "neither the contract nor the sentence was a marriage," he must be understood to speak of such a marriage as would be valid to confer the dower sought to be recovered.(*k*)

Irregular marriages were also insufficient when a party applied to the Spiritual Court for any benefit to which he was entitled by the ecclesiastical law in virtue of the marriage.(*m*) Thus it was appointed that a party seeking restitution of his wife was not to be heard *de jure*, when the matrimony was contracted clandestinely, without publication of banns, and consequently without the approbation of the church.(*n*)

In Haydon v. Gould,(*o*) the husband had procured letters of administration of the wife's effects: her next of kin then sued for a repeal, suggesting that the parties were never married. It appeared that they were Sabbatarians, and had been married by one of their ministers in a Sabbatarian congregation, using the form in the Common Prayer, except the ring, and that they cohabited for seven years until the wife's death. But it being shewn that the minister was a mere layman, and not in orders, the letters of administration were [ \*310 ] therefore repealed. The sentence was affirmed by the Delegates, upon the ground that as the man demanded a right to himself as husband by the ecclesiastical law, he ought to prove himself a husband by that law; and that though perhaps the wife, who was the weaker sex, or the issue, who were in no fault, might entitle themselves by such marriage to a temporal right, yet the husband himself, who was in fault, should never entitle himself by the mere reputation of marriage without right.

The reasons of this decision shew that it is not, as has been thought,(*p*) any authority for the position that a marriage by a person not in orders was absolutely void, but merely prove that it was not such a marriage as would entitle the husband to an ecclesiastical right, such as administration to his wife's effects.(*q*) And it is by no means clear that the mere clerical ministration would have cured its infirmity. In Scrimshire v. Scrimshire,(*r*) Sir Edward Simpson said that an absolute contract, or *ipsum matrimonium*, does not convey a legal right to restitution of conjugal rights, though an English priest had intervened, if it were otherwise than according to the English ritual.(*s*) He even questions whether it would be considered a lawful marriage

(*k*) Co Litt. 33, a n. 10.

(*l*) It appears from Swinburne, *Espousals*, s. 1, that in France also dower was denied to the wife unless the marriage had been celebrated.

(*m*) The same doctrine is laid down by Heineccius: "Jure canonico tamen connubium non gaudet effectibus ecclesiasticis, priusquam accesserit *σπογγισια*. Hinc distinctio inter matrimonium legitimum et ratum." *Elem. Jur. lib. 1, tit. 10, de Nuptiis*, s. 148. And by the Roman law, some of the consequences of the *sollennes nuptiæ* were denied to marriages constituted by consent alone. 1 Browne's Civil Law, 51 et seq.

(*n*) Lyndw. Otho, De Uxoratis. See also Oughton, tit. 193.

(*o*) 1 Salk. 119. 2 Burn. Ecc. L. 472. (*p*) 2 Phill. 21, (1 E. Ecc. R.)

(*q*) See also Green v. Green, 1 Hagg. C. R. App. 9 n. (4 E. Ecc. R.)

(*r*) 2 Hagg. C. R. 395, (4 E. Ecc. R.) (*s*) But see Hervey v. Hervey, 2 W. Bl. 187.

for other purposes. "I apprehend, unless persons in England are married according to the rites of the Church of England, they are not entitled to the privileges attending legal marriages, as thirds, dower, &c."(*u*)

In the case of *Rex v. Luffington*,(*v*) the question was, whether a marriage solemnized by a person erroneously supposed to be in orders would give the wife a settlement in the husband's parish. The Court considered the question to be one of great importance, but avoided the decision of it, on the ground that the case was imperfectly stated: some similarity between the right of settlement and the title to dower might possibly prevent them from at once holding the mere contract to be a marriage.

\*The foregoing advantages of lawful matrimony, and [ \*311 ] the censures and penalties which attended irregular marriages, account for the opinion of C. J. Vaughan, against that of the rest of the Court, that in an action for breach of promise of marriage, the plaintiff ought to have averred in the declaration *quod obtulit se* in the presence of a parson.(*w*) The other party would be entitled to object to contract matrimony in any other manner than that which was lawful, and would confer all the civil benefits of the condition.

The denial of some of the consequences of lawful marriage to unsolennized contracts, also accounts for the practice of instituting suits by parties contracted to compel solemnization, till the power of the Ecclesiastical Courts to entertain them was taken away.(*x*)

The term marriage *de facto*, as distinguished from lawful marriage, is applied both to marriages dissoluble for previous impediments, and to those deficient in the solemnities by which a legal marriage was constituted. Marriages subject to either objection offended against the ecclesiastical law, although the consequences of each kind of offence were different. Lord Coke(*y*) and Lord Holt(*z*) speak of marriages which might be dissolved for pre-contract, consanguinity, &c. as being marriages *de facto*. On the other hand, marriage in possession is said to be sufficient in personal actions and things, but marriage in right to be necessary in dower.(*a*) Here it is plain that the two species are contrasted with reference to the solemnities of constitution; because in dower a marriage which had been voidable for impediment was sufficient, the death of the husband precluding any subsequent question of it on that ground.

Lord Hale, speaking of contracts *de præsenti*, and of marriages *infra annos nubiles*, queries "whether husband shall have trespass *de tali uxore abductâ*?"(*b*) an action in which the lawfulness of the marriage is not pleadable.(*c*) It is said that marriage *de* [ \*312 ] *\*facto*, or in reputation, as amongst the Quakers, has been allowed by the Temporal Courts to be sufficient to give title to a personal estate, because the lawfulness of the marriage is not in issue, for that the issue is, whether a marriage was contracted or not, or whe-

(*u*) 2 Hagg. C. R. 402, (4 E. Ecc. R.)

(*v*) Burr. S. C. 232.

(*w*) *Holder v. Dickinson*, 1 Freem. 95. *Carter*, 233. 3 Keble, 148, S. C.

(*x*) *Oughton*, tit. 209, et seq. The same practice formerly prevailed in Scotland, 2 Hagg. C. R. 82, (4 E. Ecc. R.)

(*y*) Co. Litt. 32 a., 33 b.

(*z*) 13 Mod. 432. See 1 Show. 50.

(*a*) *Leigh v. Hammer*, 1 Leon. 53.

(*b*) Co. Litt. 33 a., note 10,

(*c*) See *Andrews*, 227. 1 Lev. 41. *Ventr.* 77.

ther the parties lived in a married state, the legality of it not coming in question.(d) Thus in debt on bond by husband and wife, the defendant pleaded *ne unques accouplè* in legal matrimony, and a demurrer was allowed, both because it altered the trial from the country to the bishop, and because it admitted the marriage but denied the legality of it, or that it was *secundum leges ecclesiæ*; whereas a marriage *de facto* was sufficient, and whether legal or not legal no ways material.(e) According to Lord Coke a marriage *de facto* would support an indictment for bigamy;(f) and it was held that marriages of Quakers and Anabaptists, or even according to any form of religion, were sufficient in actions for criminal conversation.(g) And as both of these cases require strict proof of the marriage, it thence appears that neither clerical intervention nor any other solemnity, although not proved, was matter of presumption.

These authorities establish the general position that in the Temporal Courts marriage *de facto* was valid and sufficient in all cases except in actions admitting of a plea which raised the question of its lawfulness; and further, that this was not, as has been thought,(h) owing to any laxity of the rules of evidence leaving room for the presumption of a legal marriage, but is to be ascribed to the inherent vigour of a *de facto* marriage, as comprehending present mutual consent, the *ipsum matrimonium* of the canon law. That the common law must have given effect to this doctrine, is further evident from the consideration that the Temporal Courts received the sentences of the Spiritual Tribunals as conclusive authorities on marriage and other questions within their jurisdiction.(i) On occasions, therefore, when those [ \*313 ] Courts pronounced \*upon the fact of marriage, without entertaining the question of its lawfulness their sentences bound the temporal jurisdictions.(j) who, whilst professing to bow to the judgment, could scarcely avoid deferring to the principles upon which it was founded.

It is true that a contract *per verba de presenti* did not render a subsequent lawful marriage *ipso facto* void, but voidable only,(k) and in this respect it differed from a marriage lawfully solemnized.(l) But this rule appears to have proceeded merely on the propriety of not holding a plain ceremony of marriage null until the cause of nullity was made evident. Thus, it was said, that the marriage became void, not only by sentence, but by the contracted parties afterwards intermarrying.(m) And the better opinion was, that on a sentence dissolving a marriage for precontract, the parties contracted were husband and wife by the sentence without further solemnity.(n) They were punishable for adultery if they cohabited even with the persons whom they married,(o) and they could not be punished for fornication if they

(d) Wood's Institutes, p. 59. See also 2 Roll. 585. 1 Lev. 41. Cro. Jac. 102.

(e) Allen v. Gray, 1 Show. 50. 2 Salk. 437, Comb. 131, S. C. 4 Vin. Ab. 198.

(f) 3 Inst. 88.

(g) 1 Hagg. C. R. App. 9, (4 E. Ecc. R.) Bull. N. P. 28. 1 Douglas, 166.

(h) Jacob, 2 Roper, H. & W. 466.

(i) Ante, p. 263, et seq.

(j) Bunting v. Lepingwel, 4 Rep. 29.

(k) 6 Rep. 666. Co. Litt. 33 a.

(l) Hemming v. Price, 12 Mod. 432.

(m) See Bunting v. Lepingwel, 4 Rep. 29.

(n) 1 Sid. 13. Dyer, 105 b. n. Twisden, who differed, guardedly said the marriage must be solemnized before they could be completely baron and feme.

(o) Swinb. a. 4. 6 Mod. 155.

cohabited with each other.(p) It is impossible to imagine better tests of the existence of marriage between themselves and of the nullity of the marriage of either with a third person. And it would have been singularly anomalous to have held illegitimate the issue of an intercourse which was neither adultery nor fornication between parties who would commit adultery if they had intercourse with third persons. A subsequent lawful marriage could not make such issue more legitimate, the doctrine of relation in marriage not being admitted by the common law : and Swinburne(q) is express that by the canon law issue born before celebration between those who have contracted espousals are lawful, and may inherit lands : and he says nothing of the necessity of subsequent celebration.

The more direct authorities for the sufficiency, in the Temporal \*Courts, of marriages without clerical intervention, remain [ \*314 ] to be cited. By the canon law matrimony, as well as [ \*314 ] espousals, might be celebrated between parties not only by proxy, but by letters or instruments, and marriages contracted in this manner, which from its nature excluded clerical ministration, were valid.(r) Now a constitution of Otho has been cited(s) which speaks of marriages clandestinely contracted being afterwards proved by witnesses or by instruments. And Lyndwood,(t) in his gloss upon this constitution, supposes that the object of such marriages was to effect the legitimacy of the offspring when bastardy should be objected to them by way of complaint or exception at the common law, for the purpose of depriving them of their paternal inheritance. Lord Coke(u) also in mentioning the *juramentum calumnie* says, that the ecclesiastical judge had power to examine laymen upon the oath in *causis matrimonialibus*, because contracts of matrimony were often made in private, and legitimization of children depended thereupon.

In 1661, a Quaker marriage was held valid in an action of ejectment.(v) In another case before Lord C. J. Hale, he directed the jury to find a special verdict upon a Quaker's marriage, and according to Bishop Burnet(w) "declared he was not willing on his own opinion to make their children bastards." The same biographer says, that Lord Hale "considered marriage and succession as a right of nature, from which none ought to be barred, what mistake soever they might be under in the points of revealed religion," and that "all marriages made according to the several persuasions of men ought to have their effects in law." The conduct of Lord Hale in this case is censured by Lord Keeper Guilford in terms scarcely more creditable to his learning than to his charity. "This was gross," he says, "in favour of the worst of sectaries : for if the circumstances of a Quaker's marriage were stated in evidence, there could be no colour for a \*special [ \*315 ] verdict : for how was a marriage by a layman without [ \*315 ] the liturgy good within the acts that establish the liturgy ?"(x) Whatever effect these acts had upon the lawfulness of marriage, it is almost

(p) 2 Salk. 437.

(q) Sec. 13.

(r) *Matrimonium per epistolam celebratum validum fuit*. Barosa *Collectanea Doctorum in jus Pontificium*, tom. 5, p. 377. Sanchez de *Matrimonio*, lib. 1, disp. 12. Swinburne *Eposus*. s. 13. Dalrymple v. Dalrymple, 2 Hagg. C. R. 59.

(s) Ante, p. 257.

(t) Const. Prov. 39.

(u) 2 Inst. 657. See also Cro. El. 79.

(v) 1 Hagg. C. R. App. 9 n. (4 E. Ecc. R.)

(w) Burnet's Life of Hale.

(x) North's Life of Lord Guilford, vol. 1, p. 126.

superfluous to observe that for the doctrine here advanced that they impliedly avoided all marriages not in conformity with the liturgical order, the Lord Keeper's dictum is the singular authority.

The case of *Weld v. Chamberlayne*,(y) which is cited to shew the necessity of clerical intervention,(z) has, it is probable, a directly contrary bearing, if a minister who has not had episcopal ordination is a mere layman. There the marriage was solemnized before a man who, the report states, "had taken orders according to the church of England in former times, and ejected in 1663." A ring was not used in the ceremony, but Pemberton, C. J., inclined to think it a good marriage, there being words of contract *de præsenti* repeated after this person.

Lord Holt in the following cases asserts the doctrine contended for in the most explicit terms. In *Collins v. Jessot*,(a) 3 Anne, he said, and the whole court agreed, that "if a contract be *per verba de præsenti* it amounts to an actual marriage, which the very parties themselves cannot dissolve by release or other mutual agreement, for it is as much a marriage in the sight of God as if it had been in *facie ecclesiæ*. There was this difference, that if they cohabited before marriage in *facie ecclesiæ*, they were for that punishable by ecclesiastical censures; but if after such contract either of them lay with another, they would punish such an offender as an adulterer." In *Wigmore's case*,(b) the same judge said "a contract *per verba de præsenti* is a marriage: so is a contract *de futuro*, if the contract be executed and he take her, 'tis a marriage, and they cannot punish for fornication." It is plain from these last words that the punishment spoken of in the former case was merely for a breach of order. According to another report of *Wigmore's case*,(c) Lord Holt said "In [ \*316 ] the \*case of a Dissenter married to a woman by a minister of the congregation who was not in orders, it is said that this marriage was not a nullity, because by the law of nature the contract is binding and sufficient: for though the positive law of man ordains that marriages shall be made by a priest, that law only makes this marriage irregular, and not expressly void. But marriages ought to be solemnized according to the rites of the church of England, to intitle the privileges attending legal marriage, as dower, thirds, &c."

In *Haydon v. Gould*,(d) it was admitted that the issue of a marriage by a layman might entitle themselves by such marriage to a temporal right: and a learned writer on the matrimonial law of Ireland, in citing this case, holds that the marriages of Dissenters by their ministers would support ejectment where legitimacy came in question.(e)

In the case of *Lord Fitzmaurice*,(f) a written contract *per verba de præsenti* was sustained in the Court of Delegates as a valid marriage; and was admitted to be so in another case, to the extent of rendering a subsequent marriage unnecessary.(g)

Lord Mansfield said, that "before Lord Hardwicke's Act if, a man

(y) 2 Show. 300.

(z) 2 Roper, H. & W. 448.

(a) 2 Salk. 437. 6 Mod. 155. Ca. tem. Holt, 458, S. C.

(b) 2 Salk. 437.

(c) Ca. tem. Holt, 459.

(d) Ante, p. 309.

(e) Browne's Civil Law, vol. 1, p. 75.

(f) 1732, cited 2 Hagg. C. R. 68, (4 E. Ecc. R.)

(g) *Robins v. Wolseley*, 2 Can. tem. Lec, 422. 471.

and woman made a contract *per verba de presenti*, and kept it a secret, and afterwards there was a public marriage solemnized by either of them, nevertheless the private contract took place of the subsequent marriage, because the canon law compelled a strict observance of these contracts, and decreed them to be solemnized in the face of the church. Therefore clandestine marriages were so far to be sure practicable, but they were contrary to law.”(h) It will be observed that Lord Mansfield here calls contracts *per verba de presenti* “clandestine marriages.”

There is some authority for the position that the validity of \*marriages at Gretna Green and places out of the [ \*317 ] kingdom to which English subjects have resorted for the purpose of evading the marriage laws of their own country, depends upon the English law before the marriage act. It is contended that such marriages are to be determined according to the law of the country to which the parties belong; and as the marriage acts did not extend to Scotland or places beyond the seas, by the law of England unaffected by them a marriage in the form used at Gretna Green is a good marriage. This, according to Sir George Hay, was the ground of the decision in *Crompton v. Bearcroft*,(i) in which there appears to have been no evidence that the marriage was valid in Scotland.(j)

Lord Kenyon's opinion was that before the Marriage Act an agreement between the parties *per verba de presenti* was *ipsum matrimonium* ;(k) and C. J. Gibbs said, by the canon law which governed marriages in this country before the Marriage Act, a contract of marriage entered into *per verba de presenti* is considered to be an actual marriage.(l)

The point decided in *Dalrymple v. Dalrymple*(m) was that a contract *per verba de presenti* or a contract *per verba de futuro cum copula* is a valid marriage in Scotland. Lord Stowell grounds his decision principally upon the doctrines of the canon law, and holding it to have been the common source of the law of matrimony in both kingdoms, he supports his judgment by reference to several English cases which have been cited; making it evident that he considered that before Lord Hardwicke's Act the English and Scotch laws agreed in the principal point before him.

Lastly, Lord Tenterden took the same view of the law. On the trial of an issue from Chancery on the legitimacy of a person born before Lord Hardwicke's Act, he thus charged the jury : (n) “It is material to know in what way a marriage might lawfully [ \*318 ] be celebrated at that time. A marriage most undoubtedly at that time might lawfully be celebrated in a way in which afterwards the proof of it would be extremely difficult. It might be celebrated at any time and in any place, by a clergyman: nay, as I understand the law, it might be even celebrated without a clergyman,

(h) 1 T. R. 99.

(i) Post, sec. 3.

(j) 2 Hagg. C. R. 430, (4 E. Ecc. R.) Sir W. Wynne however states (ibid. 443) that the ground of decision was that the marriage was good by the Scotch law. But see 5 Bac. Ab. (ed. 1832) 304, and post, sec. 3.

(k) Read v. Passer, 1 Peake's N. P. C. 232.

(l) Lantour v. Teasdale, 2 Marsh. 250, (4 E. C. L. R.) 7 Taunt. 830, S. C., (2 E. C. L. R.)

(m) 2 Hagg. C. R. 59, (4 E. Ecc. R.) See also MacAdam v. Walker, 1 Dow. 148.

(n) Beer v. Ward, 2d Issue, p. 282.

for a declaration by the parties in terms of contract that they were man and wife, accompanied with a cohabitation as man and wife—a contract verbally made before witnesses, a declaration of that in the presence of witnesses, would at that time of our history have made a good and lawful marriage in England, as it does now in Scotland.”

Against this array of authorities there is little to set besides the opinion of Mr. Jacob, before cited, part of whose conclusion is, that according to the law administered in England before the first Marriage Act, a matrimonial contract *de presenti* did not confer on the issue the rights of legitimacy; that at the common law it had no effect, though in cases where the parties cohabited and were reputed to be man and wife, this might be sufficient evidence for the purposes of some actions in which strict proof was not required.<sup>(o)</sup> The latter opinion has been controverted in a preceding page;<sup>(p)</sup> and the principal authorities relied on in support of the general conclusion have been shewn to have reference only to the effects of matrimony as between the parties themselves, and to be inapplicable to the *status* of the offspring. It must, however, be admitted, that some passages are to be found in the works of text writers which, unless it be thought that they refer only to the ancient law, omitting mention of the deviation from it, tend to shew that cases continued to exist in which the issue of parties irregularly espoused were illegitimate. Swinburne says that until the celebration of marriage the temporal lawyers “do not repute the affianced couple for one person, nor deem of their issue as lawful, nor doth he gain any propriety in her goods, nor she any dower in his lands, by force of the contract of matrimony only without solemnization.”<sup>(q)</sup> The same law is stated by Ayliffe and Matthew Bacon.<sup>(r)</sup> The explanation of this language appears to be that [ \*319 ] in real actions where general bastardy was the \*point in issue as well as in dower the practice was to adhere to the ancient rule requiring lawful matrimony. This was the only occasion upon which the ecclesiastical lawyers adjudicated upon bastardy,<sup>(s)</sup> and hence the general terms in which Swinburne expresses himself. Ayliffe and Bacon are without any other authority for their positions so far as they respect legitimacy.<sup>(t)</sup> Lord Stowell more guardedly says, “the common law certainly had *scruples* in applying the civil rights of dower and community of goods and legitimacy in the cases of these looser species of marriage.”<sup>(u)</sup> And so far from the authorities supporting the broad conclusion that the same species of marriage was required to confer the rights of legitimacy as to confer the rights of dower,<sup>(v)</sup> it has been seen that as early as the time of Britton private espousals made the son inheritable but did not make

(o) 2 Roper, H. & W. 474, (Law Library.)

(p) Ante, p. 312.

(q) Espousals, s. 1.

(r) Ayliffe's Parergon, 245. Bac. Ab. tit. Marriage C.

(s) They had no jurisdiction on the subject except in obedience to the king's writ, 4 Vin. Ab. 228.

(t) Ayliffe is a direct authority that consent alone was sufficient to constitute matrimony. Besides the passages cited he puts the case of a marriage by dower and says that the effect of this impediment might be merged and done away by a spontaneous cohabitation for so long a time as that the cause of such fear may be presumed to cease and be destroyed thereby, and a spontaneous consent substituted in its room.

(u) 2 Haggl. C. R. 68, (4 E. Ecc. R.)

(v) 2 Roper, H. & W. 450, (Law Library.)

the wife dowable ;(w) and that where the question of legitimacy arose in personal actions or in other cases in which the trial of it was by the country an irregular or *de facto* marriage was sufficient.

It is remarked that it would have been singularly anomalous if there had been one law of legitimacy in real actions and another in ejectment.(x) Granting that a difference might arise between the *status* of a party in the trial of general bastardy and his condition on other occasions, it will be shewn in another place that the conclusiveness to all the world of the sentence in general bastardy effectually prevented any conflict respecting the *status* of the same individual. Further, the differences between the law of legitimacy as administered in the Spiritual and in the Temporal Courts are repeatedly enumerated : (y) issue of parties who afterwards intermarried were legitimate by the canon law, and illegitimate by the common law, whilst the converse was very generally the *status* of the issue of a married woman living in adultery ; but it is not mentioned that any discrepancy prevailed in consequence of some marriages being valid by the one [ \*320 ] law and invalid by the other : yet nothing is more certain than that by the canon law the contract *per verba de presenti* was a valid marriage, and the issue of parties so contracted legitimate.

The trial of general bastardy by certificate had become obsolete even before the abolition of real actions,(z) in which alone it prevailed ; and this mode of trial was never in very frequent requisition, taking place only on a general allegation of bastardy, and that only as long as the party was living, and not only living but a party to the suit, and not only a party to the suit but adult.(a)

It is to be observed that in the trial of lawful matrimony, upon an issue as to general bastardy, the party would be certified a bastard, in whatever respect his parents' marriage was unlawful, whether from the want of solemnity or from the existence of impediments. The rule that the issue were legitimate unless a marriage of the latter kind was dissolved during the lifetime of both parties was not recognised in the Spiritual Courts ; and therefore in an early case, Thorpe, C. J. refused to send to trial an issue on the bastardy of a party who was born of a voidable marriage, but whose parents were dead ;(b) and the reason appears from another case in the same year in which it was admitted that such a party would be a bastard by the law of the holy church.(c) It would thus be quite as reasonable to contend from the passages speaking of heirship as demanding birth in lawful matrimony, for the illegitimacy at common law of the children of voidable marriages without a sentence of nullity, as for the illegitimacy of children of marriages defective in solemnity.

There remain to be noticed certain statutes upon the subject of marriage which are cited in Mr. Jacob's argument for the necessity of clerical ministration.

The statute 25 Hen. 8, c. 21, after giving the Archbishop of Canterbury the power to grant such licenses and dispensations as it had

(\*) Ante, p. 305.

(y) 7 Rep. 43. 4 Vin. Ab. 219.

(a) Per Eyre, C. J., 2 H. Bl. 156.

(c) M. 39 E. 3.

(x) 2 Roper, H. & W. 480.

(z) 3 & 4 Wm. 4, c. 27, s. 36.

(b) Ass. 39 E. 3, pl. 10, p. 234.



[ \*321 ] been the practice to obtain from Rome, enacts that all \*children procreated after solemnization of any marriages by virtue of such licenses or dispensations should be reputed and taken to be legitimate in all courts, as well spiritual as temporal, and in all other places, and inherit the inheritance of their parents and ancestors according to law. The insertion of this clause was required, if there were any occasions on which the ecclesiastical certificate would have the effect of bastardizing the issue.

The statute passed on the restoration of Charles II., intituled "An Act for the *Confirmation of Marriages*,"(d) enacts that marriages which, during the usurpation, had been solemnized before justices of the peace, according to the parliamentary ordinances, should be of the same force and effect as if they had been solemnized according to the rites and ceremonies established or used in the church or kingdom of England. And it was provided that issues on the point of bastardy or lawfulness of marriage depending on these marriages, should be tried by a jury. The stat. 6 & 7 Wm. 3, c. 6, granted to the crown certain duties upon marriages. By section 63, Quakers, Papists, Jews, and other persons who should cohabit and live together as man and wife, should pay the duties thereby granted, as if they had been married according to the law of England. And notice was to be given to the collectors within five days of every pretended marriage by such persons according to the method and forms used amongst them. Section 64 provides that nothing therein contained should be construed to make good or effectual in law any such marriage or pretended marriage, but that they should be of *the same force and virtue*, and no other, as they would have been if the act had never been made.

The words in italics in both the above acts tend to shew the opinion of the legislature that marriages possessing some validity, or validity for some purposes, might be contracted without a compliance with the canonical regulations. A contrary argument, from the guarded expressions used in the last act with reference to such marriages, would prove too much: for it would establish that the marriages of

[ \*322 ] Papists according to their forms, i. e. in the \*presence of a priest whose orders are recognized by the Church of England, were also absolutely invalid.(e)

It is said that the general opinion which prevailed in England of the necessity of solemnization by a priest appears from the manner in which clandestine marriages were formerly conducted. There would have been no reason, the argument runs, for procuring, as in the Marriages at the Fleet, May Fair, &c., the ministration of a clergyman, if the purpose could have been equally well effected by a private contract, which would have been attended with less inconvenience, delay and expense, and would at the same time have evaded the legal penalties.(f)

But it has been seen that marriages solemnized in the presence of a clergyman, although in an irregular and uncanonical manner, conferred a right of dower and other privileges denied to mere contracts,

(d) 12 Car. 2, c. 33, confirmed by 13 Car. 2, c. 11.

(e) See contra, Fielding's case, 14 How. St. Tr. 1331.

(f) 2 Roper, 460.

though the parties concerned in them were liable to punishment.(g) Substantial reasons therefore existed for preferring this mode of celebration. Besides, there does not seem to have been then any decision against the admissibility in evidence of the registers of these marriages: and even if this motive did not exist, yet having regard to the niceties of the law of marriage, and particularly to the distinctions between expressions which amounted to *verba de præsenti*, and those which were only *verba de futuro*, there was a degree of security in the performance of the prescribed ceremony of marriage by and in the presence of a person to whom it was familiar. At the present day in Scotland persons are not content with a declaration of marriage in the presence of witnesses: and English subjects, who resort thither for the purpose, do not join hands in the presence of their attendants and declare themselves married as soon as they have touched Scottish ground, but will rather purchase some protection against informality or defect of evidence by the "inconvenience, delay, and expense" of a formal contract in an accustomed manner and place. The presence of a priest would always be desired as adding a religious [ \*323 ] sanction to the contract, even if it had not \*imparted to it any further legal validity: and persons about to contract an irregular marriage would give it as much force, and comply with as many of the usual forms as possible. The matrimonial intent of the parties was also evidenced by the clerical ministration, and the contract was therefore less open to the objections of surprise and mistake, and less susceptible of an explanation inconsistent with matrimony, than mere declarations. Civilians speak of the presence of a priest among other solemnities commonly attendant upon a regular marriage, as evidence to shew the matrimonial intent of the parties, if the effect of their words or actions was doubtful. Thus, the delivery of the ring, if made either in the presence of a priest, or at the church door, was sufficient to establish matrimony.(h)

Clerical intervention was in some instances dispensed with, and it is not easy to see why marriages to which it was wanting were entered into, unless to confer the important rights of legitimacy upon the children. The obligation to contract a future marriage would have been equally well created by a contract *de futuro*. The marriages in the parish of Dale Abbey are said to have been, till a few years before the Marriage Act, solemnized by the clerk of the parish, there being no minister.(i) And the marriages at the Fleet were sometimes performed by persons who were not clergymen.(j) The Marriage Act recites that many persons did solemnize matrimony in prisons and other places without banns or license, and provides that persons so offending should be guilty of felony.(k)

The statutes 57 Geo. 3, c. 51, and 58 Geo. 3, c. 84, are relied upon as confirming the view of the necessity of clerical intervention. The former statute speaks of solemnization by a priest being required for the perfect validity of the marriage contract, the expression affording

(g) 2 Atk. 157. 650. Ca. temp. Hardw. 57.

(h) *Præsenti sacerdote vel ad fores ecclesiæ*. Menochius de Presump. lib. 3. pr. 2.

(i) Burn on Parish Registers, 127. It does not appear that the clerk was in orders.

(j) Burn on Fleet Registers, 58. 62.

(k) 26 Geo. 2, c. 33, s. 8.

grounds for contending that some validity, or validity for some purposes belonged to marriages without such \*solemnization. [ \*324 ] The other statute is in terms strictly declaratory, and it declares marriages by Scotch ministers in India to be valid.

It is further argued that the imposition of penalties upon clergymen celebrating marriages without banns or license, by the stats. 6 & 7 Wm. 3, c. 6, s. 52, 6 & 7 Wm. 3, c. 35, and 10 Ann. c. 19, s. 176, would have been nugatory, if marriages could have been constituted without the intervention of clergymen. The best answer to this is a reference to the same state of the law in Scotland.<sup>(l)</sup> The Scotch act, 1 Parl. Car. 2, Sess. 1, c. 34, an. 1661, imposed penalties upon parties to clandestine marriages by jesuits, priests, deposed or suspended ministers, or other unauthorized persons, and rendered the celebrators of such marriages liable to banishment for life; and this law continued in force until repealed by the 4 & 5 Wm. 4, c. 28: yet it is undoubtedly the law of that country that not only such marriages, if contracted, but marriages without any celebration and constituted merely by *verba de presenti* are good and valid.<sup>(m)</sup>

If clerical intervention was essential, it is difficult to understand how the knowledge or belief of the parties, that the person celebrating the marriage was or was not in orders could affect its validity: the simple question would be, whether a priest was present. Yet Lord Stowell speaks of a marriage being supported if held by the ministration of a person *ostensibly* in holy orders:<sup>(n)</sup> obviously treating the matrimonial intent of the parties as the chief object of inquiry. If *bonâ fides*, or belief of clerical presence by one or both of the parties be suggested as a ground for holding the marriage valid, the cognizance of both, that the person was not in orders, would at least have been clearly fatal to the marriage; yet it was thought necessary to enact that this should be a cause of nullity by the 4 Geo. 4, c. 76.

With reference to the evidence of ordination in cases where it may be necessary to prove that the officiating party was a clergyman, Lord [ \*325 ] Holt in one case admitted evidence of reputation as to \*the party being in orders, saying that the same proof would be allowed to prove orders as to prove marriage.<sup>(o)</sup> In a recent case, in order to prove that W., a person officiating at a marriage in Ireland in 1826 was a clergyman, a document was produced purporting to be his letter of orders signed and sealed in 1799 by the Archbishop of Tuam, which was proved to have been among his papers at the time of his death in 1829: it was held to be admissible without further evidence, having come from the proper custody and being more than thirty years old; and not having relation to the corporate character of the archbishop, the seal was to be considered the seal of the natural person, and did not require authentication.<sup>(p)</sup>

- It would follow from the doctrine of the necessity of clerical intervention that the marriages of Protestant dissenters solemnized according to their own forms were at all times void and the issue illegi-

(l) 2 Roper, 458.

(m) See also 1 Parl. Will. Sess. 7, c. 6, ann. 1698.

(n) See 1 Hagg. C. R. 280, 288, (4 E. Ecc. R.)

(o) Harriot's case, Comb. 902. And see 1 Phill. Evid. 257 n. 8th ed.

(p) Rex v. Bathwick, 2 B. & Ad. 639, (22 E. C. L. R.)

timate. In *Hutchinson v. Brookebanks*(*q*) it appears to have been thought that the Toleration Act exempted from ecclesiastical censures the marriages of Dissenters who took the oaths and made the declaration thereby directed, but in no case was it considered to impart to them any additional efficacy. According to Lord Hardwicke it gave no new right but only an exemption from the penal laws.(*r*) An opinion has indeed been hinted at(*s*) that Dissenting ministers being legalized, it could not be said that rites and ceremonies performed by them were not such as the law could recognize in any court of justice. But the doubtful benefit of this opinion cannot be extended to the marriages of Quakers who have no ministers, and whose matrimonial ceremonies do not amount to more than declarations of the contract.

\*It has been thought that the exception in Lord Hardwicke's Act may be looked upon as a legislative recognition of the validity of Quaker marriages and as indirectly legalizing them: but this seems to be an unwarrantable construction of the clause that the act should not extend to them. There is less reason for such an opinion if, as contracts *de præsenti*, they were before the act valid, though not lawful marriages. And this appears to have been their condition from cases which have been cited establishing their validity, and from others in which the privileges of lawful matrimony were denied to them. In *Green v. Green*(*t*) a Quaker marriage was held insufficient to support a suit for the restitution of conjugal rights. And in another suit to compel solemnization and consummation, the marriage was regarded as a contract entitling the party to call for those rights.(*u*)

Lord Hardwicke's Act took away from matrimonial contracts the power which the parties had of compelling solemnization in *facie ecclesiæ*, but this cannot be considered as having destroyed their effect as marriages in the cases excepted by the act. Accordingly Quaker marriages since that statute, and before the late Marriage Act, have been treated as valid: but in none of the cases was their lawfulness the point at issue.(*x*)

The stat. 6 and 7 Wm. 4, c. 85, s. 2, enacts that the Society of Friends, commonly called Quakers, may continue to contract and solemnize marriage according to the usages of the said society, and every such marriage is thereby declared and confirmed good in law, provided that the parties to such marriage be both of the said society, provided also that notice to the registrar shall have been given, and the registrar's certificate shall have issued in manner therein provided. A subsequent section makes the want of such notice or certificate a cause of nullity to all marriages.(*y*)

"The matrimonial law of England for the Jews," said Lord Stowell, "is their own matrimonial law; and an English court \*Christian examining the validity of an English Jew marriage examines it by that law, and that law only."(*z*)

(*q*) 3 Lev. 376.

(*r*) 3 Swanst. 490 n.

(*s*) See the Judgment of Sir J. Nicholl in *Kemp v. Wickes*, 1810, p. 39.

(*t*) 1 Hagg. C. R. App. 9 n., (4 E. Ecc. R.)

(*u*) *Dodgson v. Haswell*, Deleg. 1730. Ibid.

(*x*) Bull. N. P. 28. 1 Hagg. C. R. App. 9 n., (4 E. Ecc. R.) See 1 Douglas, 166.

(*y*) Sec. 49.

(*z*) 2 Hagg. C. R. 385, (4 E. Ecc. R.)

This exemption of Jewish marriages from the general law was recognized in several cases before the first Marriage Act,<sup>(a)</sup> and no doubt originated in the peculiar and alienated condition which during their former residence in this country was in part the disability and in part the privilege of that people. They were then to a certain extent subjected to a judicature distinct from that of the rest of the nation, being governed by their own laws (called in the royal writs and grants *lex et consuetudo Judæismi nostri*) administered by justices of the Jews appointed for the purpose.<sup>(b)</sup> They were also privileged by royal grants in the exercise of their religion,<sup>(c)</sup> and had a bishop or priest appointed by the crown, or elected by themselves, subject to the royal approbation.<sup>(d)</sup>

On the return of the Jews to England in the time of Charles II., their ancient exemption from the general law appears to have been tacitly allowed in the article of marriage; and their marriages are expressly excepted out of all the marriage acts except the last. The exception in the 26 Geo. 2, c. 33, had been construed to be<sup>(e)</sup> and that in 4 Geo. 4, c. 76, s. 31, is expressly confined to cases where both parties are Jews. And even in them it is not clear that the parties by conforming to the usual mode of solemnization, would not waive the benefit of the exemption, and make the general law applicable to the marriage.<sup>(f)</sup>

[ \*328 ] \*The late Marriage Act provides that persons professing the Jewish religion may continue to contract and solemnize marriage according to the usages of the said persons, and every such marriage is thereby declared and confirmed good in law, provided that the parties be both persons professing the Jewish religion; provided also that notice to the registrar<sup>(g)</sup> shall have been given, and the registrar's certificate shall have issued in manner therein provided.<sup>(h)</sup> By a subsequent section<sup>(i)</sup> a wilful non-compliance with these formalities of notice and certificate will avoid the marriage.

A non compliance with such of the usages of Jews as they deem essential to the validity of the contract was before, and it is apprehended, is even since the late act fatal to a Jewish marriage; for

(a) *Andreas v. Andreas*, 1 Hagg. C. R. App. 9 n., (4 E. Ecc. R.) *Franks v. Martin*, 5 Bro. P. C. 151. 155. *La Costa v. Villa Real*, 1 Hagg. C. R. 242 n., (4 E. Ecc. R.)

(b) *Prynne's Short Demurrer to the Jews' long discontinued barred remitter into England*, p. 27.

(c) *Rex providit quod universi Judæi in sinagogis suis celebrent submissa voce secundum ritum eorum, ita quod Christiani non audiant*. 37 Hen. 3. *Madox Hist. Exch.* 169. 1 Rym. 293.

(d) *Selden* gives a charter of King John granting and confirming to Jacob the Jew of London, presbyteratum omnium Judæorum totius Angliæ, 3 Seld. Opera. 1563. See 1 Rym. 95. 362. *Madox, Hist. Exch.* p. 177. And generally on the condition of the Jews, *Prynne*, ubi sup. *Tovey's Anglia Judaica*, 2 Hagg. C. R. 217 n. (4 E. Ecc. R.) a learned note in 2 Swanst. 505, and *Blunt's History of their establishment in England*, 1830. The subject has been much discussed on the occasions of bills in parliament for their naturalization or relief. One of these passed into a law 26 Geo. 2, c. 26, but was repealed in the following year by stat. 27 Geo. 2, c. 1.

(e) *Jones v. Robinson*, 2 Phill. 285, (1 E. Ecc. R.) The marriage of a Christian with a Jew was anciently a capital felony. *Fleta*, 54. 3 Inst. 69.

(f) See 2 Phill. 285, (1 E. Ecc. R.)

(g) This appears to be a mistake for the superintendent registrar. See ss. 4. 7. 12.

(h) 6 & 7 W. 4, c. 85, s. 2.

(i) Sect. 42.

such marriages are not merely exempt from the general matrimonial law, but are also subject to the Jewish law. A present contract, even though followed by consummation, will not constitute a marriage, if any of the forms or incidents be wanting which by the Jewish law are accounted necessary to the formation of the matrimonial contract. Thus the Court was bound to declare a marriage invalid by reason of the incompetency of the witnesses arising from *their* previous non-conformity to some of the Jewish observances.(j)

The Jewish law, like that of a foreign country, is proved by the testimony of its professors.(k) From the evidence in the cases which have been cited it appears that a formal celebration of a Jewish marriage is made by a written contract drawn up by the priest, and signed by the bridegroom and two witnesses, \*and entered in the [ \*329 ] books of the synagogue, the entry thereof being signed in like manner.(l) The original contract is delivered to the bride, and this ought to be produced in proof of the marriage.(m) The date of a Jewish marriage is said to be engraven on the wedding ring.(n)

### SECTION III.—OF THE LAW AND PROOF IN ENGLAND OF MARRIAGES ABROAD.

In a recent judgment of the Consistory Court of London, it was observed, that the number of marriages of persons connected by domicile or ownership of property with this country, which have been contracted abroad, especially since the peace, has made such marriages frequent and important subjects of evidence in the English Courts: and the Court was influenced by this consideration in admitting an examined copy of an authorized register in Barbadoes as evidence of a marriage there without calling for the witnesses who were present.(o) And without reference to foreign communication, the uninterrupted intercourse and mutuality of ownership of property, arising from contiguity and community of government, between the inhabitants of England and those of the other parts of the United Kingdom where different laws of marriage prevail, at all times supply occasions for inquiring into the principles and practice of the English Courts, in determining questions upon the law and evidence of marriages contracted out of their jurisdiction. Although there can be no doubt of the competency of Parliament to provide what shall be the English law respecting the marriages of English persons in foreign

(j) *Goldmid v. Bromer*, 1 Hagg. C. R. 324, (4 E. Ecc. R.) See further on Jewish marriages, since the first Marriage Act, *Lindo v. Belisario*, 1 Hagg. C. R. 216, (4 E. Ecc. R.) *D'Aguilar v. D'Aguilar*, *ibid.* 134, n., (4 E. Ecc. R.) *Vigevana v. Alvarez*, *ibid.* App. 7 n. (4 E. Ecc. R.) *Horn v. Noel*, 1 Camp. 61. *Ganer v. Lady Lanesborough, Peake*, N. P. C. 17. A similar respect would seem to be shown in other countries to the opinions and practice of a people distinct from the prevailing inhabitancy. Lord Stowell presumed that the validity of a Greek marriage in Turkey was left to depend on their own canons, without any reference to Mahometan ceremonies. 2 Hagg. C. R. 386, (4 E. Ecc. R.)

(k) *Lindo v. Belisario*. *Goldmid v. Bromer*, *ubi sup.* But see *Ganer v. Lady Lanesborough*, *ubi sup.*

(l) 1 Hagg. C. R. 247, (4 E. Ecc. R.) 5 Bro. P. C. 155. *Selden's Ux. Eb.*

(m) *Horn v. Noel*, 1 Camp. 61.

(n) *Grimaldi's Origines Genealogicæ*.

(o) *Coode v. Coode*, 23rd March, 1838.

countries, (p) such marriages are excepted from all the Marriage Acts. The last section of Lord Hardwicke's Act provided that nothing [ \*330 ] therein contained \*should extend to Scotland, nor to any marriages solemnized beyond the seas: and the existing Marriage Acts, 4 Geo. 4, c. 76, and 6 & 7 Wm. 4, c. 85, are expressly confined to England.

A principle of almost universal application in these questions is, that the law by which the validity of a marriage is to be determined is that of the country in which it is celebrated. Upon this rule civilians and canonists are agreed, (q) and it has always been recognized and followed by the English Courts, both Spiritual and Temporal. (r) And it will appear to be founded both in convenience and justice. "From the infinite mischief and confusion that must necessarily arise to the subjects of all nations with respect to legitimacy, successions, and other rights, if the respective laws of different countries were only to be observed as to marriages contracted by the subjects of those countries abroad, it has become *jus gentium*, that is, all nations have consented, or must be presumed to consent, for the common benefit and advantage, that such marriages should be good or not according to the laws of the country where they are made. It is of equal consequence to all, that one rule in these cases should be observed by all countries, that is, the law where the contract was made. By observing this law no inconvenience can arise; but infinite mischief will ensue if it is not." (s) It is just also that the validity of a contract should be ascertained by reference to the law by which the parties at the time of entering into it were governed.

The application of the rule was thus described by Lord Stowell, in a case before him respecting the validity of a Scotch marriage: "This cause being entertained in an English Court, must be adjudicated according to the principles of English law applicable to such a case."

[ \*331 ] But the only principle applicable to such a case by the law of England is, that the validity of the lady's marriage rights must be tried by reference to the law of the country, where, if they exist at all, they had their origin. Having furnished this principle, the law of England withdraws altogether, and leaves the legal question to the exclusive judgment of the law of Scotland." (t)

It was at one time doubted, whether the rule protected marriages in places to which parties domiciled in another state resorted, in order to evade restraints or formalities to which their marriage in their own country was subject by the law of that country. Lord Mansfield

(p) The Code Civil provides that marriages of Frenchmen abroad shall not be contracted in contravention of the provisions therein contained. Art. 170. 174, and see *Lacon v. Higgins*, 3 Stark. N. P. C. 178, (14 E. C. L. R.) 2 Dowl. & Ry. 38, (16 E. C. L. R.)

(q) Sufficit in contrahendo adhiberi solemnia loci illius in quo contractus celebratur, etsi non inveniuntur observata solemnia quæ, in loco domicilii contrahentium aut rei sitæ, actui gerendo præscripta sunt. J. Voet, in Dig. lib. 23. De ritu Nuptiarum, tit. 2, n. 4, and 85. Paul Voet de Statut. s. 9, c. 2. Huber. de Conf. lib. 1, tit. 3, n. 8.

(r) *Sanchez de Matrimonio*, lib. 3, de Claud. Consens. disp. 18, s. 10. *Ryan v. Ryan*, 2 Phillim. 332, (1 E. Ecc. R.) *Herbert v. Herbert*, 2 Phillim. 430, (1 E. Ecc. R.) *Ilderton v. Ilderton*, 2 H. Bl. 145. *Kelyng*, 79. 1 Atk. 50. *Ambly*, 303. 3 Stark. N. P. C. 178, (14 E. C. L. R.) 2 Hagg. C. R. 59. 263. 395. 437, (4 E. Ecc. R.) *Montague v. Montague*, 2 Add. 375, (2 E. Ecc. R.) (s) *Scrimshire v. Scrimshire*, 2 Hagg. C. R. 417, (4 E. Ecc. R.)

(t) *Dalrymple v. Dalrymple*, Dr. Dodson's Report, p. 6. 1 Hagg. C. R. 59, S. C. (4 E. Ecc. R.)

questioned the validity of marriages in Scotland by persons going hence for that purpose.<sup>(u)</sup> But such marriages, whether in that or in other countries,<sup>(q)</sup> have since been held to be valid in the English Courts.<sup>(w)</sup> It is not always clear whether the decisions proceed upon their validity by the *lex loci contractus*, or their validity by the law of England unaffected by the first Marriage Act:<sup>(x)</sup> the requisites by which law were, as has been seen, so simple as to be comprehended in the marriage laws of perhaps every country. According to a notice by Sir George Hay of the leading case of *Crompton v. Bearcroft*, there was no evidence that the marriage was valid in Scotland.<sup>(y)</sup> It has been said, that a marriage contracted by English persons who had resorted thither for the sole purpose of evading the prohibitions of the English Marriage Act are valid, because they are not prohibited by the English Marriage Act. There is an express provision that nothing in that act shall extend to marriages \*in Scotland, or to any marriages beyond sea. The [ \*332 ] act therefore left English subjects at perfect liberty to resort to any country for the purpose of contracting and celebrating their marriage. So far from the act containing a general and absolute prohibition, and a declaration of the nullity of all marriages contracted otherwise than in conformity to its provisions, it confines such prohibition and declaration to marriages contracted in England. The decisions, therefore, establishing the validity of such marriages, are founded upon the right of the parties consistently with the Marriage Act, to resort to the foreign country for the purpose of contracting their marriage, and upon the act itself containing no provision which renders void a marriage so contracted.<sup>(z)</sup>

To this rule in one of its consequences, namely, that a foreign marriage, *valid* according to the law of the country where it was celebrated, is good every where else,<sup>(a)</sup> the only exceptions would seem

(u) *Robertson v. Bland*, 2 Burr. 1079. 1 W. Bl. 334, and see Harg. Co. Litt. 79 b. n. 1. Huber. de Conf. leg. lib. 1, tit. 3, s. 10. 2 Addams, 23.

(q) Guernsey seems to have preceded Gretna Green, as a place of refuge from the clogging preliminaries to marriage required by Lord Hardwicke's Act. In 1760, it is related that there were vessels at Southampton always ready for five guineas to transport contraband goods into the land of matrimony. Gent. Mag. 1760, p. 30, and see 8 Ves. 74.

(w) *Crompton v. Bearcroft*, on appeal to the Delegates. Bull. N. P. 113. 2 Hagg. C. R. 444, (4 E. Ecc. R.) S. C. *Grierson v. Grierson*, 2 Hagg. C. R. 99, (4 E. Ecc. R.) Dickens, 588, S. C. *Bedford v. Varney*, before Lord Northington, 1762. *Brook v. Oliver*, Rolls, 1769. 2 Hagg. C. R. 376, (4 E. Ecc. R.) *Ex parte Hall*, 1 Rose, 30. *Harford v. Morris*, 2 Hagg. C. R. 423, (4 E. Ecc. R.) See *ibid.* 414. 428. *Butler v. Freeman*, Amb. 304.

(x) 2 Hagg. C. R. 430, (4 E. Ecc. R.) See however, *ibid.* 443. 10 East, 282.

(y) 2 Hagg. C. R. 390, (4 E. Ecc. R.) But see *contra*, per Sir W. Wynne, *ibid.* 443.

(z) 1 Burge Com. 192. 2 Hagg. C. R. 423, (4 E. Ecc. R.) The laws of other countries have not been so indulgent to marriages celebrated under these circumstances. They are pronounced invalid by Huber. de Conf. Leg. lib. 1, tit. 3, s. 9. P. Voet de Statut. c. 2, s. 9, and Pothier, Traité du Mariage, part 4, c. 1, n. 363. See Story's Conflict of Laws, c. 5. 1 Burge Com. 193, where Sanchez is quoted as an authority in favour of the law as settled by the English cases: *Dispicit mihi hæc limitatio, et credo, licet adirent, eo sine, ut possint liberè abique parochia et testibus contrahere esse ratum matrimonium. Nam qui jure suo utitur non potest dici fraudem committere, ut ea ratione effectus impediatur. "Nullus videtur dolo facere, qui jure suo utitur."* (Dig. 50. 17. 55.) Est enim fraus licita cum contrahentes utantur jure suo; ergo cum adeuntes locum ubi non viget Trident. animæ contrahendi abique parochia et testibus, utuntur jure suo, habent enim jus sic ibi contrahendi, erit fraus licita, nec ea ratione effectus ac valor matrimonii impediatur. Sanchez. de Matr. lib. 3, disp. 18, n. 29.

(a) 2 Hagg. C. R. 390, (4 E. Ecc. R.)



to be marriages contrary to the laws of Christianity, (b) and marriages prohibited by law founded upon public policy; of which latter class the marriages of the royal family without the imposed restrictions (c) are in England the only example. Under the former class polygamous and incestuous marriages are generally included; but as the latter were until very recently valid in England, if not dissolved by sentence in the lifetime of both parties, it would be difficult to deny to them at least equal validity, if celebrated in a country where they [ \*333 ] are held lawful. \*The application also and extent of the doctrine are by no means easily ascertained. The writers on the conflict of laws would confine it to such marriages only as by the general consent of Christendom are deemed incestuous, as marriages between relations by blood in the ascending and descending line, and between brother and sister by blood. (d) Such marriages, it is considered, although valid where celebrated, would be held invalid in all Christian countries: but a marriage between a man and his wife's sister, if good by the *lex loci contractus*, would be valid elsewhere. (e) It has been admitted, that there is great difficulty in determining where the prohibition of marriages between persons related in the collateral line in any degree beyond that of brother and sister, can be sustained, on the ground of their repugnancy to the law of nature. (f) As between Catholic and Protestant countries, the doctrine is incumbered with some further difficulties, respecting the effect of papal dispensations for particular marriages. And it is open to the objection, that a change in the law of one Christian country, by declaring certain marriages lawful, which all others deemed incestuous, would alter the general law by destroying the unanimity of Christian countries upon the subject.

The case of marriages abroad of members of the royal family, has been mentioned as an exception to the rule which determines the validity of marriages by the *lex loci contractus*. The first Marriage Act did not extend to marriages of the royal family, nor to marriages solemnized beyond the seas. The preamble of the Royal Marriage Act recites that it was "to supply the defect of the laws then in being;" and directs the king's consent to be set out in the license and register of the marriage. These expressions, it has been supposed, shew that a marriage in this country alone was contemplated; and the opinion [ \*334 ] has been entertained. (g) "That the Royal Marriage Act does not extend to any marriages by any descendants of George the Second, contracted and solemnized *bonâ fide* out of Great Britain, and beyond the limits of British jurisdiction." The grounds of this opinion are not stated in it, but some have been assigned which

(b) See 1 Bl. Comm. 436. Grotius de Jure Belli, lib. 2, c. 5, s. 9. Huber de Confl. lib. 1, tit. 3, n. 8. Story's Conflict of Laws, c. 5. 1 Burge's Comm. 188.

(c) By 12 Geo. 3, c. 11.

(d) See Vaughan's Rep. 206. Blackmore v. Thorpe, 1 Hagg. C. R. 392, (4 E. Ecc. R.) Lord Brougham has some expressions favourable to this opinion, 2 Cl. & Fin. 531.

(e) Story's Conflict of Laws, c. 5.

(f) 1 Burge's Comm. 188. The difficulty of pronouncing for the invalidity of such marriages is acknowledged by Grotius de Jure Belli et Pacis, lib. 2, c. 5, s. 12.

(g) Dr. Lushington and Mr. J. Richards are understood to have given this opinion upon the question of the legitimacy of the children of the marriage at Rome of the Duke of Sussex and Lady Augusta Murray.

do not appear tenable. The expression, "the laws then in being" must be confined to the Marriage Act, which being limited to this kingdom, the remedial act must be limited to the same extent. Not only, however, does this expression comprehend the previous law, so far as it was unaltered by that act, but this construction is imperatively demanded by the circumstance that this was the only law applicable to royal marriages: and an act to remedy a defect in the law must refer to the law on the subject of the act. Another reason assigned for confining the operation of the act to domestic marriages is, that the license and register are forms not necessarily attendant on marriages elsewhere; and it is contended, that were any other construction to be put upon the act, marriages of the royal family abroad would be altogether prevented, which cannot be supposed to have been the desire of the legislature. But the clause directing the consent to be set out in the license or register is merely directory, and as neither license nor registration was necessary to the validity of these marriages, it can only be taken to mean that the consent shall be so set out, provided the marriage be solemnized by license and registered. (h)

A further exception to the rule of the universal validity of marriages which are valid where they were celebrated, arises from the doctrine of the English Courts, so far as it has been established, of the indissolubility of English marriages by sentences of divorce *a vinculo* in foreign countries. Their marriage subsisting in the eye of the English law, the divorced parties, during their joint lives, remain under an absolute incapacity to \*contract another, and such second [ \*335 ] marriage, though celebrated in the country of the divorce, and valid there, is invalid in England.

It is not easy, in the present state of the authorities, to determine whether this incapacity is indelible, or exists only so long as the party has an English domicile. In the first reported case upon the subject, which occurred so lately as 1812, the law was laid down in terms favourable to the former opinion, but more general than the decision of the case required. A man named Lolly, domiciled and married in England, had gone to Scotland for the purpose of procuring, and had there procured, a divorce *a vinculo* on the ground of adultery. Afterwards, during the lifetime of his first wife, he married another woman in England. In respect of this second marriage, he was tried and convicted of bigamy. His case having been reserved for the consideration of the twelve judges, they were unanimously of opinion that the conviction was right, laying down, it is said, at the same time the general rule that a marriage contracted in England could not be dissolved in a different country by any authority whatever. (i)

Before this case, although some doubt had at one time existed upon the subject, (j) the Superior Courts in Scotland had affirmed the power

(h) The effect of the act upon the law of Ireland, which had then an independent legislature, and the law of Hanover, is an entirely distinct question. See Sir J. Dillon's Treatise on the Royal Marriage Act, 1811. Letter explanatory of a bill in Chancery, filed on behalf of Sir Augustus D'Este, 1831. Juridical Exercitation on the case of the children of the Duke of Sussex, 1832. Papers elucidating the claims of Sir Augustus D'Este, 1832.

(i) Rex v. Lolly, 1 Russ. & Ry. C. C. 236, (1 Br. Cr. Cas.) 2 Cl. & Fin. 567 n. S. C. Lolly was sentenced to transportation, and actually suffered part of the punishment.

(j) See Ferguson's Cases on Marriage and Divorce.

of the Consistorial Courts there, to grant a divorce *a vinculo* in the case of English parties married in England, and having no *bonâ fide* domicile in Scotland.(k) After and notwithstanding Lolly's case, the Scotch courts continued to exercise the same power.(l) But upon the case of Tovey v. Lindsay(m) coming before the House of Lords by appeal from the Court of Session, Lords Eldon and Redesdale expressed their opinions that the Scotch court had not power to dissolve the marriage in question, which had taken place at Gibraltar, where the English law prevails, between a Scotchman by birth, but having an English domicile, and an English woman. It does not [ \*336 ] \*appear whether the ground of their opinions was that the marriage was contracted under the law of England, or that the parties had an English domicile at the time of the divorce. In the immediately subsequent cases before the Consistory Court in Scotland, some deference was shewn to this authority;(n) but the Court of Session have since reaffirmed their jurisdiction, and have held, in the case of parties married in England, that if there be sufficient domicile to found the jurisdiction of the Scotch courts, that is a residence of forty days, the law of Scotland ought to prevail, and that a divorce may be granted without proof of an actual *bonâ fide* Scotch domicile.(o)

In McCarthy v. De Caix,(p) a Dane by birth and domicile had been married in England to an English woman. After their marriage he returned with her to Denmark, and during their continued residence there, the marriage was dissolved by the sentence of a court in Denmark of competent jurisdiction. The question of the validity of this divorce came before Lord Brougham in 1831, and he held, on the authority of Lolly's case, that the marriage was not dissolved by the sentence of the Danish court.

In a case in the same year before the Consistory Court of London, a suit was instituted by the wife of the first marriage, for the purpose of having a second marriage of her husband declared null. The first marriage took place in England, and the parties were *bonâ fide* domiciled here. The husband went to Scotland for a temporary purpose, and obtained there a sentence of divorce from his first wife. He then married a second wife in Scotland. The court decided that the marriage was null, on the ground that as the parties were at the times of the first marriage and of the divorce domiciled English subjects, they were by the English law prohibited by a personal incapacity from entering [ \*337 ] \*into a fresh contract of marriage. The judge, however, expressed an opinion that the doctrine of Lolly's case had not been extended to the case where the parties to a marriage in England became actually *bonâ fide* domiciled in a foreign country, and were divorced by the sentence of a competent tribunal there, such a domicile being distinguishable from a temporary and fugitive resi-

(k) Utterton v. Tewash, Ibid. 23. 55.

(l) Pollock v. Mannors, 1813. Homfray v. Newte, 1814. Ferguson, 273, 274.

(m) 1 Dow. 117.

(n) Ferguson, 68. 168. 209. 226. In one case, Gordon v. Pye, Ferguson, 276, three of the judges held that proof of the residence of forty days, though sufficient to give the court jurisdiction, did not warrant the application of the Scotch law, but that, for that purpose, a real Scotch domicile was necessary.

(o) Oldaker v. Goldney, Fac. Coll. 20th Feb. 1834.

(p) 2 Russ. & Myl. 614. 3 Hagg. E. R. 642 n., (5 E. Eccl. R.) 2 Cl. & Fin. 568 n. S.C.

dence for the purpose of obtaining the divorce; and he expressed his anxiety that his decision should not be construed to go one step beyond that case, nor in any manner to touch the case of a divorce *a vinculo* pronounced in Scotland between parties who, though married when domiciled in England, were at the time of such divorce *bonâ fide* domiciled in Scotland, still less between parties who were only on a casual visit in England at the time of their marriage, but were, both then and at the time of their divorce, *bonâ fide* domiciled in Scotland. (q)

In the recent case of *Warrender v. Warrender*, (r) the House of Lords as a Scotch court of appeal have definitively established the competency of the courts in Scotland to entertain a suit to dissolve a marriage contracted in England. The facts of this case did not however call for a decision of the question whether a *bonâ fide* Scotch domicile be necessary. The husband was a native of Scotland, and retained his domicile in that country. He was married in England to an English lady. The suit was instituted by him for a divorce on the ground of adultery committed by her in France, where she continued to reside. At the time of their separation the husband had, by letter, undertaken to allow her to reside where she pleased. This letter was offered in evidence by the wife for the purpose of rebutting the presumption of law that the domicile of the husband was her domicile; but the Court of Session held that it had not this effect, and that they had jurisdiction to dissolve the marriage. In moving the House of Lords to affirm this judgment, Lord Brougham said, "In order to dispose of the present question, it is not at all necessary on the one side to support, or on the other to impeach the authority of Lolly's case, or of any other which may have been determined in \*England upon that authority. This ought to be steadily borne in mind. The resolution in Lolly's case was, that an English marriage could not be dissolved by any proceeding in the courts of any other country for English purposes; in other words, that the courts of this country will not recognize the validity of a Scotch divorce, but will hold the divorced wife dowable of an English estate, the divorced husband tenant thereof by the courtesy, and either party guilty of felony by contracting a second marriage in England. Upon the force and effect of such a divorce in Scotland, and for Scotch purposes, the judges gave, and indeed could give, no opinion; and as there would be nothing legally impossible in a marriage being good in one country which was prohibited by the law of another, so if the conflict of the Scotch and English law be complete and irreconcilable there is nothing legally impossible in a divorce being valid in the one country which the courts of the other may hold to be a nullity. Lolly's case, therefore, cannot be held to decide the present, perhaps not even to affect it in principle. In another point of view, it is inapplicable, for though the decision was not put upon any special circumstance, yet in fairly considering its application we cannot lay out of view that the parties were not only married but really domiciled in England,

(q) *Conway v. Beazley*, 3 Hagg. E. R. 639. 653, (5 E. E. R. R.)

(r) 2 Cl. & Fin. 488. 9 Bligh. N. S. 89. 2 Shaw & Mac. 209. *S. C. Warrender v. Boscawen*, Fac. Col. 28th June, 1834.

and had resorted to Scotland for the manifest purpose of obtaining a temporary and fictitious domicile there in order to give the Scotch courts jurisdiction over them, and enable them to dissolve their marriage; whereas here the domicile of the parties is Scotch, and the proceeding is *bonâ fide* taken by the husband in the courts of his own country to which he is amenable and ought to have free access, and no fraud upon the law of any other country is practised by the suit. It must be added, that in Lolly's case the English marriage had been contracted by English parties, without any view to the execution of the contract at any time in Scotland: whereas the marriage now in question was had by a Scotch man and woman whom the contract made Scotch, and who therefore may be held to have contemplated its execution and effects in Scotland." But although Lord Brougham thus considered Lolly's case inapplicable, he took occasion to express at considerable length the difficulty which he felt in acceding to the doctrine of that case, and pointed out several consequences of it productive [ \*339 ] of confusion and inconvenience. After referring to the Scotch authorities, he said, that they establish clearly the proposition in its largest sense, that the Scotch courts have jurisdiction to divorce, when a formal domicile has been acquired by a temporary residence, without regard to the native country of the parties, the place of their ordinary residence, or the country where the marriage may have been had.

Lord Lyndhurst avoided the expression of any distinction between a formal, and a *bonâ fide* domicile. In that case he considered the question of domicile to be clear, and the place where the adultery was committed being, in his judgment, immaterial, and the course of decision in Scotland being uniform, he thought it impossible that any serious doubt can be entertained with respect to this judgment. They were to decide according to the law of Scotland. Upon the decision in Lolly's case, he pronounced no opinion. If it were correct, and any inconvenience should result from the conflict of the law of the two countries, the legislature must apply the remedy. Those were considerations which ought not to lead the House to reverse the judgment in this case, if they were satisfied of its correctness. For these reasons he advised their lordships to affirm the judgment.

This judgment, it is to be observed, establishes nothing with respect to the validity, *by the English law*, of a Scotch divorce *a vinculo*, of parties married in England: and if that law was correctly laid down in Lolly's case, that the indissolubility of the marriage by the *lex loci contractûs*, rendered it indissoluble every where; or if the Scotch judges were right in holding that it is unnecessary that the parties should be *bonâ fide* domiciled in Scotland, but that a residence for a sufficient time to give the court jurisdiction is all that is requisite to enable it to grant a divorce; then the laws of the two countries are in irreconcilable conflict. If, relying upon the validity of the sentence, one of the divorced parties contracts a second marriage, there will be two wives or husbands of this party living at the same time, one of whom is deemed the lawful consort by the law of England, and the other by the law of the country of the divorce; and there may be [ \*340 ] a family of children by the second marriage, which are

\*legitimate in the country of the divorce, and illegitimate

in England: whilst the children of the first marriage, born after the divorce, will be legitimate in the latter country, but illegitimate in the former.

The doctrine adverted to in *Conway v. Beazeley*, that the law by which these questions should be determined is that of the actual domicile, to the exclusion both of the *lex loci contractus*, and of the law of the country in which the parties have acquired merely such a domicile as founds the jurisdiction, is supported in a recent work by several arguments deserving of attention.(t)

The foregoing observations have no reference to cases in which the first marriage took place in a country, between parties domiciled in a country, by the law of which it was dissoluble. When parties domiciled in Denmark, were married there, and afterwards divorced *a vinculo matrimonii*, according to the Danish law; and the husband married a second wife, such second wife was allowed by the Prerogative Court to administer to the husband.(u)

The principle which refers questions respecting the validity of marriages to the *lex loci contractus*, in its converse application—that a marriage void according to the *lex loci*, is also void by the English law, is generally, but not universally, recognized.(v)

In *Scrimshire v. Scrimshire*,(w) a marriage in France, between two English subjects, minors, had been declared null by a sentence of the Parliament of Paris, from the circumstance of the solemnization having taken place in a private house, by an unauthorized priest, and without the consent of parents. On a question respecting its validity, in the Consistory Court of London, Sir Edward Simpson considered that it must be tried by the law of France, and admitting the sentence not as a bar,(x) but as evidence of the French law, held the marriage to be void. And in subsequent cases, marriages in foreign countries between British subjects, have been held invalid here, by [ \*341 ] reason of their nullity according to the *lex loci contractus*.(y)

It has been endeavoured to distinguish between cases where the parties, though British subjects, were domiciled in the country, and those in which they were only temporarily resident there, and had no *animus morandi*; and a further distinction has been taken between marriages (at least of the latter description of persons) which have been solemnized according to the foreign ceremonial, and those in which the parties have conformed, as far as possible, to the law of the original country.

For the first distinction, the principal authority is the case of *Harford v. Morris*,(z) in which a marriage was held good, though void according to the law of the country where it was celebrated. It was said to be clear, that a transient residence by coming one morning

(t) 1 Burge's Comm. 680. And see Story's Conflict of Laws, c. 7.

(u) *Ryan v. Ryan*, 2 Phillim. 332, (1 E. Ecc. R.)

(v) See 2 Hagg. C. R. 391, (4 E. Ecc. R.)

(w) 2 Hagg. C. R. 395, (4 E. Ecc. R.)

(x) But see *Roach v. Gordon*, 1 Ves. Sen. 159.

(y) *Middleton v. Janverin*, 2 Hagg. C. R. 437, (4 E. Ecc. R.) *Lacon v. Higgins*, 3 Stark. N. P. C. 178, (14 E. C. L. R.) *Dow. & Ry. N. P. C. 33, S. C.*, (16 E. C. L. R.)

(z) 2 Hagg. C. R. 423, (4 Ecc. R.) The sentence in this case was reversed on other grounds.

and going away the next, did not give jurisdiction to the *lex loci*, and cause it to take cognizance for this purpose of a marriage then and there celebrated.(a) Sir George Hay thought that a marriage at Calais, by parties who went thither from this country, and came away the next day, would be valid, if good by the English law.(b) This distinction was also recognized by Lord Stowell in *Ruding v. Smith*, and influenced his decision of that case.(c) But it is rather opposed by the case of *Middleton v. Janverin*, and by the opinion of Lord Hardwicke, which will presently be stated.

On the second distinction it has been said that when the parties have recourse to the form of solemnization established in the country in which they are, their mutual intention must be presumed that it should be a marriage or not according to the law of that country.(d) But the converse doctrine which is here implied, that a disregard of the *lex loci*, and a conformity or a *cy pres* conformity to the law of [ \*342 ] the original country would exempt the marriage from the application of the *lex loci contractus* is far from being established. In *Butler v. Freeman*,(e) the parties, who were both English, eloped from this country to Antwerp, where they were married according to the rites of the Church of England, yet Lord Hardwicke said that the marriage would not be valid here unless it was so by the laws of the country where it was had. And in *Lacon v. Higgins*,(f) a marriage between British subjects at Versailles, solemnized by a clergyman of the Church of England, according to the rites of that church, was held to be invalid by reason of its nullity by the French law.

An opinion has been intimated that if the *lex loci contractus* imposed any highly unreasonable restraints upon marriage, it might perhaps be held in England that the marriage of British subjects in a manner conformable to the general law of England was valid.(g) Lord Stowell supposed the case of a foreign law fixing the marriageable age at an advanced period of life, as forty, and said that it would be a question whether the marriage of two British subjects, not absolutely domiciled abroad, should be invalidated on that ground.(h)

The case before him (*Ruding v. Smith*), the learned judge thought as nearly entitled to the privileges of strict necessity as could be; the husband had attained the age of twenty-one years, but being under thirty, the consent of his father was required by the Dutch laws: the wife was a minor without any legal guardian; and the decision was therefore founded partly on the insuperable difficulty of obtaining any marriage according to the Dutch law.(i) The stat. 57 Geo. 3, c. 31(j) recognizes the principle of the validity from the necessity of the case of marriages invalid under other circumstances.

On the same high authority of Lord Stowell, the necessity of the case arising from the impossibility or extreme difficulty of compli-

(a) Ibid. 431.

(b) Ibid. 435.

(c) Ibid. 389.

(d) 2 Hagg. C. R. 411. 393, (4 Ecc. R.) See also 2 Phillim. 285, (1 E. Ecc. R.)

(e) 2 Ambler, 303.

(f) 2 Stark. N. P. C. 178, (14 E. C. L. R.)

(g) 2 Jacob's Roper's Husband and Wife, 499.

(h) *Ruding v. Smith*, 2 Hagg. C. R. 371, (4 E. Ecc. R.)

(i) 2 Hagg. C. R. 423, (4 E. Ecc. R.)

(j) Cited ante.

ance with the *forms* prescribed by the *lex loci* might exempt  
 \*a marriage from its operation. And this impossibility or [ \*343 ]  
 difficulty might consist in the circumstance of the *lex loci* demanding  
 an abandonment of religious opinions. It being the practice of man-  
 kind to consecrate their marriages by religious ceremonies, the differ-  
 ences of religion in all countries which admit residents professing  
 religions essentially different, unavoidably introduce exceptions in that  
 matter to the universality of the rule which makes mere domicile the  
 constituent of an unlimited subjection to the ordinary law of the coun-  
 try.(k) If from legal or religious difficulties the ceremony could not  
 take place according to the law of the country, the law of England  
 did not say that its subjects should not marry abroad.(l)

Conformably to this principle the House of Lords held valid a mar-  
 riage between Protestants celebrated at Rome by a Protestant clergy-  
 man. Lord Eldon at first intimated a doubt respecting the validity  
 of the marriage, and said that where persons were married abroad it  
 was necessary to shew that they were married according to the *lex*  
*loci*, or that they could not avail themselves of the *lex loci*, or that there  
 was no *lex loci*. Afterwards a Roman Catholic clergyman proved at  
 the bar of the House that at Rome two Protestants could not be mar-  
 ried according to the *lex loci*, because no Catholic clergyman would  
 celebrate marriage between two Protestants; and the marriage was  
 held to be valid.(m)

Certain cases remain to be examined in which the marriages of  
 English subjects celebrated upon a foreign soil, and not falling within  
 any of the foregoing exceptions, are considered in the English Courts  
 as governed not by the *lex loci*, but by the law of England apart from  
 the general marriage acts. The cases alluded to are those of the mar-  
 riages of British subjects in British factories abroad, in the chapels or  
 houses of British Ambassadors, and in foreign countries in the military  
 occupation of British troops.

\*Lord Stowell said of marriages in the British factories [ \*344 ]  
 at Lisbon, Leghorn, Oporto, Cadiz, Smyrna, Aleppo, (some of those estab-  
 lishments existing by authority under treaties, and others under indulgence and toleration,) that they are regulated by the  
 law of the original country, to which they are still considered to belong.  
 An Englishman in the Mogul Empire was not bound to consult the  
 Koran for the celebration of his marriage. There was a *jus gentium*  
 upon this matter, a comity which treated with tenderness, or at least  
 with toleration, the opinions and usages of a distinct people in this  
 transaction of marriage.(n)

The stat. 4 Geo. 4, c. 67, recites that the British factory at St.  
 Petersburg was by a manifesto of the Emperor of Russia declared to  
 be abolished from the 20th of June, 1807, and enacts that all mar-  
 riages (both or one of the parties thereto being subjects or subject of  
 of this realm) that have since the 20th of June, 1807, been solemnized,  
 or that should thereafter be solemnized at St. Petersburg by the  
 chaplain to the Russia Company, or by a minister of the Church of

(k) 2 Hagg. C. R. 384, (4 E. Ecc. R.)

(l) 2 Hagg. C. R. 391, (4 E. Ecc. R.)

(m) Croise Dign. 276, and see further on the necessity of Protestants abjuring their  
 religion in order to enable them to marry according to the law of the Papal States, Swift v.  
 Swift, 4 Hagg. 139, 153, cited post.

(n) 2 Hagg. C. R. 385, 386, (4 E. Ecc. R.)



England, officiating instead of such chaplain in the chapel of the said Russia Company, or in any other place before witnesses, should be as good and valid in law, and so deemed in the British dominions, as if the same had been solemnized before the abolition of the said factory.

The stat. 3 & 4 W. 4, c. 45, after reciting that the British factory at Hamburg was dissolved in 1808, declares and enacts that all marriages of parties subjects, or parties one of them being a subject of this realm, which had been solemnized at Hamburg since the abolition of the British factory there, by the chaplain appointed by the Bishop of London, or by any ministers of the Church of England officiating instead of such chaplain in the episcopal chapel of the said city, or in any other place before witnesses, according to the rites of the Church of England, shall be good and valid in law to all intents and purposes, as if the same had been solemnized in the British Factory at Hamburg before the abolition thereof.(o)

[ \*345 ] \*With respect to marriages in ambassadors' chapels abroad, Lord Stowell said, he was not aware of any judicial negotiation upon the point, but the reputation which the validity of such marriages had acquired, made such a recognition by no means improbable if the question were brought to judgment. And alluding generally to these kind of marriages, he said, "if the practice had been sanctioned by long acquiescence and acceptance—of the one country which had silently permitted such marriages, and of the other which had silently accepted them; the courts of this country would not incline to shake their validity upon large and general theories, encountered as they were by numerous exceptions in the practice of nations.(p) An opinion was in one case expressed by Lord Ellenborough that the validity of marriages in ambassadors' chapels depended upon the *lex loci contractus*. He said that these marriages, if made by the allowance of the foreign state, would be good marriages in those countries; but that if not a good marriage in the place where it was celebrated, it could not be a good marriage any where.(q) Lord Eldon, however, is said to have given his opinion in the House of Lords, that there was no doubt about the validity of such marriages;(r) and the question is now set at rest by the statute which will presently be cited.

Places in the military occupation of British troops, have been considered to be, for the purposes of British marriages, subject to the English law. It was partly upon this principle that the marriage in St. Domingo of a British soldier of the army there, with an English woman, the widow of another, was held valid;(s) Lord Ellenborough intimating an opinion that the king's troops would carry with them the law of England, civil and ecclesiastical.(t) And the same reason influenced the decision that a marriage between two British subjects at the Cape of Good Hope, when that place was occupied by English troops under a capitulation, was valid, notwithstanding its nullity by the Dutch laws, which governed the place.(u) Lord Stowell, also,

(o) Interrogatories to prove a marriage at Hamburg which had been celebrated before the abolition of the factory are inserted in the Appendix.

(p) 2 Hagg. C. R. 371. 386, (4 E. Ecc. R.)

(q) 10 East, 286.

(r) Jacob's Roper's Husband and Wife, vol. 2. 497.

(s) Rex v. Brampton, 10 East, 282.

(t) Ibid. 287.

(u) Ruding v. Smith, 2 Hagg. C. C. 337, (4 E. Ecc. R.)

in expressing \*an opinion of the validity of a marriage, celebrated by the chaplain to the forces, between an officer [ \*346 ] of the army of occupation in France, and an Englishwoman, said that the marriage, though void according to the French law, would be supported here, on the ground that under the circumstances, the parties were not French subjects under the dominion of the French law.(v)

The stat. 4 Geo. 4, c. 91, recites, that it was expedient to relieve the minds of all his Majesty's subjects from any doubt concerning the validity of marriages solemnized by a minister of the Church of England, in the chapel or house of any British ambassador or minister residing abroad within the country to the court of which he is accredited; or in the chapel belonging to any British factory abroad, or in the house of any British subject residing at such factory; as well as from any possibility of doubt concerning the validity of marriages, solemnized within the British lines by any chaplain or officer, or other person officiating under the orders of the commanding officer of a British army serving abroad; and it then declares and enacts, that all such marriages as aforesaid shall be deemed and held to be valid in law, as if the same had been solemnized within his Majesty's dominions, with a due observance of all forms required by law.

It will be observed, that the protection of this act is extended only to such marriages in factories and ambassadors' chapels, as are performed by clergymen of the Church of England, although no form of solemnization is made necessary. The validity of marriages otherwise performed is not touched by the act, and will depend upon the previous law. Marriages within the British lines may be valid by the act, although performed without either ritual or clergyman.

Before this statute it was considered, that marriages in ambassadors' chapels, did not acquire any validity from the place of celebration, unless the parties were subjects of the ambassador's country; (w) but it is not expressly required by the statute, that \*either [ \*347 ] of the parties should be a British subject; although this construction is countenanced by the preamble, and perhaps demanded by reasons derived from international law. In cases within the statutes before cited relating to marriages at St. Petersburg and Hamburg, one at least of the parties must be a subject of this country.

In the Waldegrave Peerage case, the claimant's parents were married at Paris, on the 3rd October, 1815, whilst that city was possessed by the army of occupation. The parties were both English, and Lord Waldegrave was a lieutenant-colonel, and in command of a regiment. The marriage was solemnized at his quarters, and within the British lines, by a clergyman of the Church of England, who had a royal commission as chaplain to the forces, but without orders from the commander of the division to officiate at this marriage.

It was contended, first, that the principle upon which marriages within the British lines are valid, is the necessity of the case arising from the interruption of the business of the ordinary functionaries and tribunals of the country; and that here there was no such interruption

(v) *Burn v. Farrar*, 2 Hagg. C. R. 369, (4 E. Ecc. R.)

(w) *Pertreus v. Tondcar*, 1 Hagg. C. R. 136, (4 E. Ecc. R.) and see *Lacy v. Dickinson*, *ibid.* 386, n. 1 Esp. N. F. C. 353.

or necessity, the French king's authority having been then established, and the civil tribunals and municipal institutions then performing their ordinary functions; and secondly, that to bring the marriage within the terms of the act, 4 Geo. 4, c. 91, it was necessary that it should have been celebrated by the orders of the officer superior in command. The Lord Chancellor, however, thought that the circumstances of the marriage brought it within the protection of the statute; and that there was no foundation for the argument that that was to be so construed as to render it necessary that the marriage should be by the orders of the commanding officer. Lord Brougham concurred; and the claim was allowed.(x)

Lastly, it must be observed, that it will not always be easy to ascertain whether the particular case falls within any of the exceptions [ \*348 ] which have been enumerated, so as to render the marriage \*valid, notwithstanding its want of conformity to the *lex loci*; and in the clearest cases, it is only as regards the English courts, that the validity of such marriages can be depended upon. In the country where they took place, and elsewhere abroad, a different view of them may be taken. And, therefore, in the words of Lord Stowell, "it is certainly to be advised, that the safest course is always to be married according to the law of the country, for then no question can be stirred."(y)

The validity of marriages abroad being thus, with the exceptions which have been noticed, tried in the English Courts by reference to the *lex loci contractus*, it may be useful next to inquire into the provisions of those foreign laws a knowledge of which is material in questions before our own courts. The cases will first be examined in which the *lex loci* is founded upon the English law, as it prevailed before Lord Hardwicke's act.

The particulars in which the matrimonial law of Ireland differs from that of England, are to be wholly sought for in legislative enactments. The substratum of the law of marriage is the same in both countries;(z) but this was visible longer and more of it still remains in Ireland than in England.

Lord Hardwicke's act did not extend to Ireland, and with an exception introduced by the Irish act of 12 Geo. 1, c. 3, to the effect that a marriage after consummation should not be set aside on the ground of a pre-contract not followed by consummation, the old law respecting matrimonial contracts subsisted until the power of enforcing them was taken away by stat. 58 G. 3, c. 81.

By the Irish act 9 G. 2, c. 11, marriages and matrimonial contracts by minors, without the paternal or other consent therein mentioned, may be annulled, if the parties, or their parents are possessed of property to a specified amount and the suit for nullity be commenced within a year after marriage.(a)

[ \*349 ] \*On the marriages of Protestant Dissenters in Ireland, there are two Irish statutes, the first of which 11 Geo. 2, c. 10, s. 3, after reciting that several dissenting Protestants, scrupling to be married according to the form of ceremony prescribed by the

(x) MS. Dom. Proc. 15th July, 1837.

(y) 2 Hagg. C. R. 391, (4 E. Eco. R.)

(z) 1 Addams, 65, (2 E. Eco. R.)

(a) See *Rex v. Jacobs, Ry. & Moo.* 140, (21 J. C. L. R.)

established church, did therefore frequently enter into matrimonial contracts, in their own congregations before their ministers or teachers, and thereupon lived together as husband and wife, enacts for the ease of such persons, that they should not be prosecuted in any ecclesiastical court by reason of their entering into such contracts, or living together; provided they and the minister or teacher took the oaths, and subscribed the declaration according to the stat. 6 Geo. 1, c. 5.

The next statute on the subject is the 21 & 22 Geo. 3, c. 25 (Irish,) which recites that the removing any doubts that might have been entertained concerning the validity of matrimonial contracts or marriages entered into by Protestant dissenters, and solemnized by Protestant dissenting ministers or teachers, would tend to the peace and tranquillity of many Protestant dissenters and their families. It then declares and enacts, that all matrimonial contracts or marriages *therefore entered into* between Protestants Dissenters, and solemnized by Protestant dissenting ministers or teachers, should be good and valid, and that all parties to such marriages, and all persons claiming under them, should in virtue of such marriages be entitled to all rights and benefits therefrom, in like manner as if such marriages had been solemnized by a clergyman of the Church of Ireland.

The marriages of Protestant Dissenters in Ireland at the present day stand therefore upon a similar footing as regards their validity, to those of Quakers in this country before the late Marriage Act. By one statute they are exempted from ecclesiastical censure, but any recognition of their validity is carefully avoided. The stat. 21 & 22 Geo. 3, c. 25, (b) is retrospective only. It has indeed been thought that before this statute the marriages of Dissenters if solemnized according to their own rites, and if both parties were of the same persuasion, were good to all civil effects: for instance, to support an ejectment where legitimacy came in question, or an action for criminal conversation: but that if the parties came to entitle themselves to any rights in the Ecclesiastical \*Courts they must prove a marriage according to the ecclesiastical law. (c) No [ \*350 ] authority is stated for the limitation of the proposition to the marriages of Dissenters according to their own rites. If the Irish Toleration Act (which does not in this respect differ from the English) had any effect upon those marriages, it surely would have been to render them no longer amenable to ecclesiastical reprehension; but if this had been so, the stat. 11 Geo. 2, c. 10, s. 3 would have been unnecessary. It has been seen that such an operation has been denied to the English Toleration Act in the case of *Hutchinson v. Brookebanke*, (d) and it is impossible to contend that either act would be construed to make valid marriages which it did not legalise. The only remaining foundation for that measure of validity ascribed to such marriages is the contract *per verba de præsenti*, which is not dependent upon the religious dissent of the parties, although it may be comprehended in the forms which they use.

After several Irish statutes passed to prevent clandestine marriages of persons of fortune and intermarriages between Protestants and

(b) *Supra*.

(c) Dr. Brown's Civil Law, vol. 1, p. 75, n.

(d) 3 Lev. 376. See also 2 Swanst. 490. 3 Mer. 405.

Catholics(e) the Irish stat. 19 Geo. 2, c. 13 enacted that every marriage that should be celebrated after the 1st of May, 1746, between a Papist, and any person who had been or had professed him or herself to be a Protestant at any time within twelve months before such marriage, or between two Protestants, if celebrated by a Popish priest, should be absolutely null and void without any process, judgment, or sentence of law whatsoever. A subsequent stat. 32 Geo. 3, c. 21, admitted of marriages between Protestants and Catholics, but provided that neither Protestant Dissenting ministers, nor Popish priests should celebrate marriage between Protestants of the established church and Roman Catholics.

By a previous statute(f) celebration by a Catholic priest of marriage between Protestant, or between a Protestant and a Papist was made a capital felony, and other penalties were imposed by different [ \*351 ] statutes.(g) But the penal part of all these statutes is now repealed by stat. 3 & 4 Wm. 4, c. 102, which however provides that the act was not to give validity to any marriage ceremony not valid under the existing law. Marriages therefore by Catholic priests are still invalid, if either of the parties be Protestant, although the priests are no longer punishable for celebrating them. The validity of such marriages between Papists depends upon the canon law, and seems to be tacitly acknowledged by the above acts.(h)

Under the act of 19 Geo. 2, strict proof of Protestantism is required to invalidate a marriage,(i) and if it was contracted whilst the penal laws were in force against Catholic clergymen celebrating marriages to which a Protestant was a party, there is a strong presumption that the priest before solemnization satisfied himself of the Catholicism of the parties.(j)

In a case in an English Ecclesiastical Court, where it became necessary to take evidence of the Irish law of marriage between Catholics, it was deposed by one gentleman at the Irish bar: "That there is no restriction of time or place as to Catholic marriages in Ireland, a private house is as good as a church, and the afternoon or evening as any canonical hour. The marriage however must be by a Roman Catholic priest, or a person in orders (for a Protestant minister will do as well,) and according to the form of the Roman Catholic ritual." But by the evidence of another barrister: "It may be celebrated by a Roman Catholic priest, or a priest of any other denomination. But it must be by the Roman Catholic form, or at least some form that unites the parties in the state of matrimony."(k)

It is not very easy to see what greater validity could be imparted to a marriage between Catholics by its celebration in the presence of a Protestant dissenting minister, or how for this purpose he could be [ \*352 ] legally distinguished from a layman. If such is the law it may possibly proceed on the ground that some religious ceremony being by the creed of the parties essential to constitute the

(e) 9 Wm. 3, c. 3. 2 Anne, c. 6, s. 5. 9 Geo. 2, c. 11 (Irish.)

(f) 12 Geo. 1, c. 3, s. 1 (Irish.)

(g) 33 Geo. 3, c. 21 (Irish.)

(h) See 1 Gabbatt, 410, 411.

(i) Bruce v. Burke, 2 Addams, 471, (2 E. Ecc. R.) See also Dowling v. Constable, Irish Term Rep. 259.

(j) Per Sir John Nicholl, 2 Addams, 476, (2 E. Ecc. R.)

(k) 2 Add. 473, (2 E. Ecc. R.)

marriage contract, the presence of a minister of religion by their direction is peculiarly good evidence of their matrimonial intention, and of their being in earnest in their expression of consent.

It was held at *Nisi Prius*, in England, that evidence of a marriage in Ireland by a dissenting clergyman was sufficient without proof of the law of Ireland.<sup>(l)</sup> The validity has also been established of a marriage in Ireland celebrated by a clergyman of the establishment in a room of a private house,<sup>(m)</sup> and of the marriage of a minor without the consent of parents or guardian.<sup>(n)</sup>

But where the marriage was under a license from the Archbishop of Dublin authorising the clergyman to perform it at the usual canonical hour and place, it was considered that the marriage having been in a private house was void by reason of non-compliance with the license in respect of place.<sup>(o)</sup>

The marriages of British subjects in most of the British colonies or settlements are also governed by the English law, before the stat. 26 Geo. 2, c. 33, except so far as it is varied by the law of the particular colony.

Upon this principle a marriage between two British Protestant subjects celebrated at Madras in a private room, by a Portuguese Roman Catholic priest, according to the Catholic form in the Portuguese language, was held to be valid, although without the license of the governor which it was the practice to obtain.<sup>(p)</sup>

Scotchmen in India have been held to have English domicile,<sup>(q)</sup> \*and their marriages in that country by Presbyterian ministers, whose orders are not acknowledged by the English law, were upon the imperfect footing of contracts *de presenti* before Lord Hardwicke's act. But by the stat. 58 Geo. 3, c. 84, after reciting that doubts had arisen concerning the validity of marriages which had been had and solemnized within the British territories in India by ordained ministers of the church of Scotland, and it was expedient that such doubts should be quieted, and that the law respecting such marriage should be declared for the future, it was declared and enacted, that all such marriages should be of the same force as if solemnized by clergymen of the church of England. It was, however, provided with respect to future marriages thus celebrated, that both or one of the parties should be members or a member of the church of Scotland, and should, before the marriage, make a declaration in writing to that effect.

In *Tovey v. Lindsay*,<sup>(r)</sup> the marriage took place at Gibraltar, between a Scotchman and an Englishwoman. The wife asserted that it was solemnized according to the rites of the English church, but the husband alleged that it was after the manner of the church of Scotland, and by a person not in orders according to the English law. The form appears to have been thought immaterial, and its validity

(l) Lancaster Assizes, 1814, Per Marshall Serjeant, Evans Stat. 160 n.

(m) *Smith v. Maxwell*, Ry. & Mo. 80, (21 E. C. L. R.) 1 Carr. & P. 271. S. C. (11 E. C. L. R.)

(n) *Rex v. Jacobs*, Ry. & Mo. 140, (21 E. C. L. R.)

(o) Lancaster Assizes, 1823. In bigamy, per Bayley and Holroyd, J.

(p) *Lantour v. Teasdale*, 2 Marsh. 243, (4 E. C. L. R.) 7 Taunt. 830, (2 E. C. L. R.)

(q) *Monroe v. Douglas*, 5 Madd. 379. *Bruce v. Bruce*, 6 Bro. P. C. Ed. Toml. 566. 2 Bos. & Pul. 229 n.

(r) 1 Dow. 133, 139.

was not questioned, but it was admitted that the law applicable to it was the law of England.(s)

The law of marriage in several of the British colonies has been altered by acts passed by the colonial legislatures. The following is a summary of these enactments:—In Jamaica, an act of 33 Car. 2, c. 18, passed to prevent marriages without the previous authority of banns or a license granted by the governor. In Barbadoes, two acts with similar provisions were passed in 1734 and 1739. In Antigua, an act of 24 Car. 2, c. 21, validates marriages before a justice of the peace in the absence of an orthodox beneficed minister. In Dominica, an act, No. 35, s. 7, 28th September, 1802, declares valid [ \*354 ] marriages before a justice of the \*peace when no Protestant clergyman could be found. In Grenada, an act, No. 101, s. 31, 11th December, 1807, provides that marriages must be solemnized by the rector, of one of the cures in the island, after due publication of banns in the church of the parish wherein the female resides, or by virtue of a license from the governor or commander-in-chief, and that marriages without such banns or license should be void. In Upper Canada, an act of 33 Geo. 3, c. 5, confirms marriages previously contracted before any magistrate, or commanding officer of a post, or adjutant or surgeon of a regiment, acting as chaplain, or any other person in any public office or employment; and provides, that until there should be five persons or ministers of the church of England within the district, and if neither of the parties lived within eighteen miles of any parson, their marriage might be solemnized by a justice of the peace in manner prescribed. A subsequent act of 38 Geo. 3, c. 4, empowers the minister and clergymen of any congregation of persons professing to be members of the church of Scotland, or Lutherans, or Calvinists, who shall be authorized in manner therein directed, to celebrate matrimony between parties, of whom one shall have been a member of such congregation at least six months before the marriage. In Nova Scotia, an act of 33 Geo. 3, c. 5, confirms marriages theretofore solemnized before magistrates and other lay persons, in the presence of one or more credible witness or witnesses where the parties have cohabited; and a subsequent act 35 Geo. 3, c. 2, authorises the governor to appoint a proper person within any township or district wherein no regular clergyman resides, to solemnize marriages between parties, both of whom shall have resided one month at least within such province or district, and declares valid such marriages. In New Brunswick, an act 3 Geo. 4, c. 9, prescribes the mode of publication of banns and the celebration of marriage by a justice of the peace commissioned by the governor, where no clergyman of the church of England resides and officiates in the parish. In Prince Edward's Island, an act 6 Geo. 4, c. 6, s. 1, declares valid marriages previously solemnized by any clergyman or minister of the gospel, or by any justice of the peace or other lay person, either by virtue of a license from any governor, lieutenant-governor, or commander-in-chief, or by publication of banns, or otherwise, where the [ \*355 ] solemnization was in the presence of one \*or more credible witness or witnesses, and where the parties have coha-

(s) See *Jephson v. Rixon*, 3 Knapp, 150.

bited together; and provides, that all clergymen and ministers of the gospel, of whatever sect or denomination, officiating as such in any congregation, and all others whom the governor, lieutenant governor, or commander-in-chief of the island may thereto authorize, shall thereafter have power and authority to solemnize marriages, either by license as aforesaid or banns, and it subjects to a penalty, ministers who celebrate marriages without such license or banns, or marriages between parties, of whom one or both shall be under twenty-one years of age, having parents or guardians living, without the consent of such parents or guardians, and provides, that such marriages without such consent, shall be null and void.

Upon the subject of marriages in Newfoundland, the British stat. 57 Geo. 3, c. 51, after reciting that a doubt had existed whether the law of England, requiring religious ceremonies in the celebration of marriage to be performed by persons in holy orders, for the perfect validity of the marriage contract enacts, that all marriages in that colony should be celebrated by persons in holy orders, and all other marriages are declared void. But it was provided, that nothing therein contained should extend to any marriages that might be had under circumstances of peculiar and extreme difficulty in procuring a person in holy orders to perform the celebration, and in which the law might on that account otherwise determine on the validity of such marriages. There is an exception of marriages before 1818, and the marriages of Quakers and Jews. This act was repealed by stat. 5 Geo. 4, c. 68, which empowers teachers or preachers of religion, licensed by the governors or a secretary of state, to celebrate marriages in places within the colony where, by reason of the difficulty of internal communication, it might be inconvenient to attend at a church or chapel of the establishment. The latter act was to remain in force for five years only, but has since been continued by stats. 10 Geo. 4, c. 17, and 2 & 3 Win. 4, c. 78.

The matrimonial law of Lower Canada and of St. Lucia, is, except so far as it has been altered by statutes, that which prevailed in France before the Revolution. The forms of the Council of [ \*356 ] \*Trent were not received in that country, but it was required, that after publication of banns, marriage should be celebrated by the curé in the presence of four witnesses, and according to the form prescribed by the church.<sup>(t)</sup> By several statutes of the legislature of Lower Canada,<sup>(u)</sup> marriages by Protestant ministers and justices of the peace in certain districts are made valid.

The matrimonial law of British Guiana, of the Cape of Good Hope, and of Ceylon, is the Roman Dutch law which prevailed there at the period of their annexation to the British empire.<sup>(v)</sup> The observance of certain preliminaries is essential to the validity of marriage. These are a declaration before the magistrates or commissaries of the desire of the parties to intermarry, and a request of the publication of banns, the payment of duty on marriages, and the due publication of banns.

(t) Ordinance of Blois, Art. 40, Declaration of 1639. Pothier *Traité du Mariage*, Part 4, c. 1, n. 349.

(u) 35 Geo. 3, c. 4. 44 Geo. 3, c. 11. 4 Geo. 4, c. 19. 5 Geo. 4, c. 25.

(v) 1 Burge, xiv.



The celebration is by a magistrate, and it is not necessary that it should be in a church.<sup>(w)</sup>

The recent abolition of negro slavery in the British colonies was followed by an order in council<sup>(x)</sup> respecting the celebration of marriages in the crown colonies. The order recites, that "since the abolition of slavery throughout the British colonies, plantations and possessions abroad, the marriage laws of the said colonies, plantations and possessions have been found inappropriate to the altered condition thereof, and inadequate to the increased desire for lawful matrimony therein, and that it is expedient and necessary to amend the said marriage laws, and to adapt the same to the altered state and condition of society in the said colonies, plantations, and possessions." It is therefore ordered, that it shall be lawful for any minister of the Christian religion, ordained or otherwise set apart to the ministry of the Christian religion, according to the usage of the persuasion to which he may belong, to publish within the colonies of British Guiana, Trinidad, St. Lucia, the Cape of Good Hope and Mauritius, or any [ \*357 ] of them, banns of marriage between persons desirous \*of being joined together in matrimony, and after such banns shall have been duly published in the manner therein prescribed, to solemnize matrimony between the said parties according to such form and ceremony as shall be in use or be adopted by the persuasion to which the minister solemnizing such marriage shall belong. The order then proceeds to authorize the solemnization of the marriages of persons under age, without the consent of the parents or guardians or other person (if any) whose consent is required by law, unless such parents or guardians or other persons, or one of them, shall forbid the marriage, and give notice thereof to such minister before he has solemnized the same. And in places where there may not be any such minister of religion or not a sufficient number of such ministers to afford convenient facilities for marriage, the order provides for the appointment by the governor of the colony of a marriage-officer, to solemnize marriages within such part or parts of the colony in which such appointment shall be made, as the governor shall from time to time direct. The order also provides for the public solemnization of the marriages before witnesses, and for the registration of the marriages. The order then legalizes retrospectively all marriages contracted and solemnized previous to the abolition of slavery in the said colonies, plantations and possessions, between slaves and between parties, one of whom was a slave, and also in some cases between free persons of colour; and since the abolition of slavery, between apprentices and other persons of free condition by ministers of the Christian religion other than clergymen of the church of England, and indemnifies all persons who may have solemnized any such marriages, or reputed marriages, or who have in any manner assisted thereat; and provides for the preservation of the evidence and registers of such marriages: and also legalizes retrospectively marriages *de facto* between persons, one or both of whom were in the condition of slavery but which marriages *de facto* had never been sanctioned by any public ceremony or registered upon such persons, within one year after the

(w) 1 Burge, 174.

(x) London Gazette, September 16th, 1838.

coming into operation of the order duly solemnizing the marriage ceremony before any clergyman of the established church, or in any other manner authorized by the order, and making a declaration, attested by the witnesses present, and signed by the minister or marriage-officer before whom the ceremony was performed, [ \*358 ] of the fact of the marriage, and the names and ages of the children born of the marriage.

In the Isle of Man, an act to prevent clandestine marriages was passed on the 27th of May, 1757, by which marriages solemnized in any other place than a church, unless by special license, or solemnized without publication of banns or license of marriage, from a person having authority to grant the same, are declared null and void.(y)

In Scotland, the law of marriage remains in almost exact conformity to the canon law as it formerly prevailed in this country,(x) and accordingly distinguishes between regular and irregular marriages. The public solemnization which is necessary to the former is a matter of order, but is by no means essential to the validity of the marriage, which is always sufficiently constituted by mutual consent alone.(a) There is some variation from the canon law in the requisite forms of a regular marriage. It is necessary that proclamation of banns should be made in the church, three times immediately before divine service, but the rule of the canon law, which required the banns to be published on three Sundays or holidays, has been relaxed by an act of the General Assembly, which authorizes the parish minister to make the two last proclamations on the second Sunday, or in extraordinary cases to make them all on the same day. A certificate of the due proclamation of banns is granted by the clerk of the Kirk-session, upon which the marriage is celebrated by the parish minister before two witnesses, and usually at the house where the woman resides. There is no further ceremony than the question of mutual acceptance put by the minister and answered by the parties, and a declaration by the minister that the parties are married. Certain statutes provide, that the ceremony shall be performed by a minister of the kirk of Scotland or of the episcopal communion, duly qualified by taking the oaths of allegiance and abjuration.(b) But the penalties imposed by these statutes upon jesuits, priests, and ministers of other communions have been repealed.(c)

\*Marriage in Scotland may be irregularly contracted [ \*359 ] *per verba de presenti*, or *per verba de futuro*, followed by *copula*. A mutual declaration in terms *de presenti*, importing immediate consent of the parties to hold each other thenceforth as husband and wife, whether such declaration be in writing,(d) or oral and provable by witnesses,(e) constitutes marriage. Consent being the essence of the contract, the expression of it must of course be with a matrimonial intent; and therefore words uttered in jest, or with a different object from that of actual marriage, are of no force.

(y) 1 Burge, 171.

(x) Ante, p. 298.

(a) Stair's Inst. b. 1, t. 4, s. 6. Ersk. Inst. b. 1, t. 6, s. 5.

(b) 1661, c. 34. 1672, c. 9. 1690, c. 27. 1698, c. 6.

(c) Stat. 4 & 5 Wm. 4, c. 28.

(d) Taylor v. Kello, Mor. 12. 687. Ferguson's Cons. Cas. 34. Dalrymple v. Dalrymple, 2 Hagg. C. R. 54, (4 E. Eco. R.)

(e) Walker v. M'Adam, Ferguson Cons. Cas. 189. 1 Dow. 148.

Thus, where a man, in order to get lodgings in respectable houses and to save a woman from rude treatment, acknowledged her for his wife, the circumstances were held by the House of Lords insufficient to warrant the conclusion of marriage.(f) And in cases of irregular marriage, the consent must be shown to have been full and deliberate, and not influenced by force or fraud.(g) But if that passes between the parties which amounts to a marriage, it cannot be affected by their subsequent conduct.(h)

Marriage is also constituted by a contract *per verba de futuro cum copulâ*.(i) But before *copulâ*, such contract, which corresponds to the *sponsalia* of the canon law, and is a mere promise of marriage, may at any time be resiled from by either of the parties, although such party so acting without any adequate cause, may be liable to the other in damages.(j) The promise is by the *copulâ* converted into actual marriage by reason of a conclusive presumption of consent to a present marriage being exchanged at the time of the *copulâ*. An exception has been taken in the case of illicit intercourse subsisting between the parties previously to the promise;(k) but in a recent case, the marriage was established notwithstanding such intercourse.(l)

[ \*360 ] \*It was formerly considered that the promise could only be proved by the writing or oath of the party, but it has lately been held that it may be established by circumstances. Thus, where no express promise of marriage was contained in the parties' letters to each other, but the inference was obvious, from the whole language of such correspondence, that the parties contemplated an honourable connexion, and *concubitus* ensued, a marriage was held to have been constituted.(m)

The open cohabitation of the parties as husband and wife, or the fact of their being in the language of the Scotch law, "habit and repute" as such, is somewhat loosely said to constitute, whilst it is merely evidence of, marriage. For it is competent to prove, that notwithstanding such cohabitation and reputation the parties did not intend marriage, but assumed the semblance of the married state to save appearances or to answer some other purpose.(n) Again, if the parties cohabited and were reputed as married persons from the first, the conclusion of marriage will be warranted, but if their connexion was illicit in its commencement, it will be presumed to continue to be of the same character, and it will be necessary to adduce other evidence than that of the parties' cohabitation to establish their marriage.(o)

(f) *Cunningham v. Cunningham*, 2 Dow. 482.

(g) *M'Neil v. M'Gregor*, 1 Dow. N. S. 208.

(h) *Ibid.* And see other cases upon marriage *per verba de presenti*, Mor. p. 12, 680, et seq. *Ferguson's Consistorial Cases* and Appendix to Dr. Dodson's Report of the case of *Dalrymple v. Dalrymple*.

(i) *Stair's Inst. b. 1, t. 4, s. 6.* *Cunningham v. Cunningham*, *Ferguson's Cons. Cas.* 212, 183, n.

(j) *Stair's Inst. b. 1, t. 4, s. 6 n.* *Hog v. Gow*, 27th May, 1812. *Murray's Rep. Case of Ross*, 19th July, 1816. (k) *Stair's Inst. b. 1, t. 4, s. 6 n.*

(l) *Sink* 19th November, 1829. 2 Sc. Jur. 38. 88 D. B. 89.

(m) *Honyman v. Campbell*, 2 Dow. & Cl. 265. 5 Shaw & Wils. 92, S. C. *Smith v. Grierson*, 27th June, 1755. Mor. p. 12, 391.

(n) *Stair's Inst. b. 1, t. s. a. 6 n.* *Cunningham v. Cunningham*, 2 Dow. 482.

(o) *Ibid.* *Somerville v. Halero*, 7th July, 1826. Mor. p. 12, 635. *Inglis v. Robertson*, 3d

The effect of the condition of being habit and repute as husband and wife, has been magnified by the statute of 1503, c. 77, which provides, that a woman who has been reputed the wife of a man till his death, shall be entitled to and enjoy the *terce* (or dower) till it be proved that she was not his lawful wife. This statute appears to have originated the doctrine in all cases of this kind, that the burden of proof is upon the party who denies the marriage. But the evidence of circumstances may be sufficient to rebut the presumption. Thus, although the parties frequently lived together, and acknowledged each other as husband and \*wife, yet from the profligate character of the woman and other circumstances it was in- [ \*361 ]ferred that the man was not serious, and the marriage was not sustained. (p) It is held in these cases, that the evidence of the friends of the parties in the same rank of life ought chiefly to be regarded. (q)

The legal incapacities to contract marriage differ but little from those of the English law. (r) The disabilities arising from a prior marriage, want of age, want of reason, and consanguinity or affinity, are the same as in England. And by stat. 1600, c. 20, a divorce for adultery incapacitates the guilty party from marrying the person with whom the adultery is stated in the sentence to have been committed.

The decree of the Council of Trent requiring the presence at marriages of a priest and of two witnesses being of force in many parts of Europe, it may be useful to state, that in a case respecting the validity of a marriage in Sicily, (s) it was proved by the testimony of jurists on the construction of that decree, that it is not necessary to the validity of a clandestine (in opposition to a regular) marriage, that the priest or minister of the parish should pronounce any words, prayers, or benediction, his presence alone being sufficient; that it is not necessary that the witnesses should pronounce any words indicative of their being witnesses to such marriage, and that it is not necessary to obtain their consent to intervene as such on occasion of the celebration.

In *Swift v. Swift*, (t) which was a suit by the husband for the restitution of conjugal rights, the libel pleaded, that the marriage took place in a private house at Rome according to the rites and ceremonies prescribed by the decree of the Council of Trent, which is received and obeyed as law in that city. It further appeared, that in order to obtain a valid marriage there, if the parties were previously Protestant, it was necessary that they should solemnly renounce the Protestant religion, and confess themselves Roman Catholics. The wife pleaded that such \*renunciation must be *bonâ fide*, but [ \*362 ] that in the present instance it was colourable and formal, was therefore of no avail, and could not confer any validity on the pretended marriage. But the Court held that the husband was not bound to answer whether the renunciation and circumstances accompanying it, were *bonâ fide* on his part or on the part of the lady.

In France, by the Code Civil, marriages are celebrated before a civil functionary, the parties superadding any religious ceremonies at

March, 1786. Mor. p. 12, 689. Mor. p. 12, 637, et seq. *McNeil v. McGregor*, 1 Dow. & Cl. 208. (p) *Adair*, 1 Sc. Jur. 164. 7 S. D. 597.

(q) *Thomas*, July 8, 1829. 7 S. D. 872. (r) *Ante*, p. 272.

(s) *Herbert v. Herbert* 2 Hagg. C. R. 276, (4 E. Ecc. R.)

(t) 4 Hagg. 139. 153.

their discretion. Several formalities must previously be complied with, the principal being the notification of the consent of parents or grandparents, the want of which is an absolute bar to the marriage of men under twenty-five years, and women under twenty-one, but only delays the marriage of persons above those respective ages. To the marriage of infants under twenty-one, who have neither parents nor grandparents, the consent of a family council, composed of six of the nearest relations, is necessary. Males under eighteen, and females under fifteen, cannot contract marriage, but the king may, for weighty reasons, dispense with this restriction, as well as with some of those upon marriages within our prohibited degrees of kindred and affinity, as between uncle and niece, aunt and nephew, or a man and his sister-in-law.(u) Penalties are imposed upon those who celebrate or contract marriage without the formalities prescribed by law: such marriages, however, are not absolutely void, but the right to question them and to have them annulled belongs to different persons according to the circumstances.(v) A marriage contracted *bonâ fide*, even though afterwards annulled, confers all its civil advantages on the wife and children, and the fraud of one party does not affect the other, nor the children of the marriage.(w)

Among the particulars in the act of marriage required to be registered are, the time and place of celebration, the names, descriptions, and ages (so far as they affect the marriage law) of the married persons, the names of their fathers and mothers, and \*of the [ \*363 ] four witnesses required, and a declaration of their relationship to the parties.

In proving a foreign marriage it is an important consideration, whether the law of the country must first be proved, and then a marriage according to it, or whether evidence of the fact of marriage, as that the parties agreed to enter then into the relation of husband and wife, is not sufficient proof of a valid marriage, until encountered by evidence, that by the *lex loci contractûs*, the marriage in question is for defect of solemnity, or other reasons, invalid.

In the case of *The King v. Brompton*,(x) the parties had been married at St. Domingo, in a chapel, by a person habited like a priest, and the objection that there was no evidence that this was a good marriage by the law of St. Domingo, did not prevail; Lord Ellenborough considering, that from the circumstances every presumption was to be made in favour of its validity. Upon a trial for bigamy, evidence of a marriage in Ireland by a dissenting clergyman was held sufficient, without giving any proof of the law of Ireland upon the subject.(y) But this case is opposed by one on the home circuit, in which to prove the first marriage in Scotland, evidence of its legality by the Scotch law was required.(z) And in bigamy, it is to be observed, strict evidence of a valid marriage is necessary.

If it should be a question, whether, for the purpose of establishing legitimacy, the *lex loci contractûs* must be proved, in order to shew

(u) See a Law of 16 April, 1832.

(v) Sec 5 Bac. Ab. 312 n. Ed. 1832.

(w) Code Civil, livre 1, tit. 2, c. 3; tit. 3, c. 4; tit. 5, c. 1 and 4.

(x) 10 East, 282.

(y) Lancaster Summer Assizes, 1814, before Marshall, Serjt. 1 Evans's Statutes, (ed. 1829,) p. 160 n.

(z) Ibid. 10 East, 285.

the conformity of the marriage thereto, it may be argued, that as marriage was originally a natural and civil contract, to the constitution of which, as of all contracts, mutual consent was (and by the laws of some countries still is) the only requisite, (a) nothing more need be shewn, than that the parties exchanged their consent to become thenceforth husband and wife; and that the essentiality by the *lex loci* of attendant solemnities is not to be presumed. In this and other countries they are made necessary \*by positive laws, of which, [ \*364 ] especially since they respect a contract, a different nation cannot be required to take notice until proved, and the general presumption of which may, as in the case of Scotch marriages, prove to be erroneous. (b) These considerations are altogether beside the aid which a foreign marriage, no less than an English one, may derive from cohabitation as husband and wife, reputation, and other circumstances from which the fact of a valid marriage may be inferred. (c)

Where it may be necessary to adduce evidence of the law of a foreign country, for the purpose of shewing either the validity or the invalidity of a marriage, the law, if unwritten, may be proved by the evidence of practising advocates or other persons professionally conversant with it. (d) The evidence of an unprofessional person as to the Scotch law of marriage was rejected. (e) It has been stated, that the sentence of a French court was received as evidence of the marriage law of that country. But if the law is written, it ought to be proved by a copy properly authenticated. (f) In one case, Abbott, C. J., by consent of the parties, received a copy of the Cinq Codes from the library of the French Vice-Consul here as evidence of the French law of marriage. (g)

On the modes of proving a foreign marriage it seems to be settled, that a sentence of a court of competent jurisdiction in the country where the marriage was celebrated, directly establishing the marriage, is conclusive of its validity in our courts. (h) But this rule cannot be held to extend to the cases of polygamy and incest before excepted from the principle of the universal validity of marriages which are valid when they are solemnized. And on the other hand, inasmuch as some marriages invalid according to the *lex loci*, might be supported here, a sentence of nullity of marriage in the country where it was celebrated is not conclusive in \*our courts, [ \*365 ] although it appears to be admissible and entitled to weight in evidence. (i)

Where a divorce was effected abroad by an unwritten judgment

(a) See Lord Stowell's Judgment, *Dalrymple v. Dalrymple*, Dr. Dodson's Report, p. 10.

(b) See 1 Evans's Statutes, ed. 1829, p. 160 n.

(c) See 10 East, 287, et seq. 4 Hagg. 139. 153.

(d) *Middleton v. Janverin*, 2 Hagg. C. R. 437, (4 E. Ecc. R.) *Dalrymple v. Dalrymple*, ibid. 81. Ibid. 271. 2 Addams, 473, (2 E. Ecc. R.)

(e) 1 Evans's Statutes, 160 n. But see 3 Stark. N. P. C. 178, (14 E. C. L. R.)

(f) See *Picton's case*, 30 How. St. Tr. 491. 3 Esp. N. P. C. 58. 4 Camp. 155.

(g) *Lacon v. Higgins*, 3 Stark. N. P. C. 178, (14 E. C. L. R.) *Dow. & Ry. N. P. C. 38. S. C.*, (16 E. C. L. R.)

(h) *Roach v. Garvan*, 1 Ves. sen. 159. Per Lord Hardwicke in *Boucher v. Lawson*, Ca temp. Hardw. 89, 2 Swanst. 349. See Pr. Ch. 207. 3 Phill. 63, (1 E. Ecc. R.)

(i) *Sinclair v. Sinclair*, 1 Hagg. C. R. 297, (4 E. Ecc. R.) *Scrimshire v. Scrimshire*, 2 Hagg. C. R. 395, (4 E. Ecc. R.) But see *Coltington's case*, 2 Swanst. 342 n.

according to the forms of the law applicable to the case, it may be proved here by parol, and the parties themselves, not being otherwise incapacitated, are competent witnesses to establish the fact.(j)

In the claim of Lord Dunsany, in 1823, to vote at the election of a representative peer of Ireland, it appeared that the marriage of the claimant's parents had been solemnized in a private room in Dublin, that there was no entry of it in the parish register, and that the only surviving witness was unable to travel from age and infirmity. The House of Lords made an order, authorizing two of the Irish judges to attend upon and take the examination of the witness on oath,(k) which was accordingly done, and the judges' report was delivered in at the bar of the House upon oath by a person who received it from one of them. The marriage was thus proved, and the claim was established.(l)

In order to give in evidence an examined copy or certified extract from a foreign register, it would appear to be necessary to prove, that the register is, according to the law of the country, a document of an authentic and public nature. In the absence of such proof, Dr. Lushington rejected an examined copy of the register of marriages of an episcopal chapel at Edinburgh.(m) Lord Kenyon also rejected an examined copy of the register of marriages in the Swedish ambassador's chapel at Paris.(n)

In a recent suit for divorce by reason of adultery, the marriage was alleged to have taken place in 1823 at Barbadoes, in a private house, before the rector of the parish. A copy of the entry in the registry [ \*366 ] of marriages was exhibited, signed by the rector, and his signature was attested by a notary. It appeared, that by the local laws of Barbadoes, passed by the House of Assembly in 1661, registers of births, marriages, and deaths were directed to be kept, and this, it was contended, rendered the register a record of authority. Dr. Lushington said the only question was, whether the marriage had been satisfactorily proved, and it was a question of very great importance at this time, when so many marriages were solemnized abroad in foreign countries; and in our colonies, where life was so precarious, it would be too much to insist upon the evidence of persons present to establish the fact of a marriage. The evidence in this case, which was a printed paper, signed by the rector of the parish in Barbadoes, could not be received without proof of collation; with such proof, however, and with the act of the legislature of Barbadoes before him, establishing a registry in the island, he should hold that the entry was a satisfactory proof of the fact of marriage. He, therefore, rescinded the conclusion of the cause, in order to admit a collated and examined copy of the register.(o)

In the claim of C. A. Ellis to the Barony of Howard de Walden, the marriage of Lord Hervey at Quebec in 1779, was proved by a person who was present at the marriage: it appeared, from his evi-

(j) *Ganer v. Lady Lanesborough*, Peake, N. P. C. 18.

(k) The case of Viscount Northland, in 1819, was cited as a precedent for this proceeding.

(l) *Palmer's Practice of the House of Lords*, p. 339.

(m) *Conway v. Beazley*, 3 Hagg. F. R. 651, (5 E. Eoc. R.)

(n) *Leader v. Barry*, 1 Esp. N. P. C. 353.

(o) *Coode v. Coode*, Consistory Court of London, 23d March, 1838.

dence, that a register of marriages was kept at that city, but no further proof was required.(p)

In the Gardner Peerage case, to prove the marriage of the second Lord Gardner with Miss Adderly at Fort St. George, Madras, in the year 1796, the duplicate of the register, signed by the clergyman, was produced from the India House by a clerk in the Secretary's office; but it was not admitted, until proof was given that it had been transmitted to the India House in the usual manner,(q) and that the clergyman by whom it was signed had actually officiated at Madras at the date of the marriage.(r)

A marriage in France may be proved in Chancery by a certified extract, examined with the register, and verified by affidavits \*sworn before the British Consul-General. If the [ \*367 ] extract and affidavit are in a foreign language, a translation must be made by a notary, or other competent person, and also verified by affidavit before the Consul-General.(s) There must be a further affidavit of the fact, that the person before whom the other affidavits were sworn was at the time British Consul-General in France, and that the signatures of his name are of his handwriting.

In an old case on a question of legitimacy, a marriage at Utrecht was proved by a certificate, under the seal of the town and of the minister there, that the parties were married and cohabited together as man and wife.(t) But Willes, C. J., questioned the admissibility of the evidence, saying, that although the certificate of the minister as to the fact of marriage, at a place where there was no bishop, might perhaps be equal, and might be resembled to the certificate of the bishop here, he was clearly of opinion that the certificate of their cohabiting together ought not to have been admitted.(u)

With the exception of that partial allowance of the doctrine of legitimation by subsequent marriage, which is known by the name of *bastard eigne* and *mulier puisne*,(v) it is by the law of England necessary to the constitution of legal consanguinity, that every one of the filiations composing it should have been preceded by marriage.(w)

But although rejected by the law of England, this doctrine, which is common to both the civil and the canon law, prevails in many of the British colonies, in Scotland, and in most countries of Europe and America.(x) The consequent conflict of other laws \*with [ \*368 ] that of England respecting the *status* of ante-nuptial issue,

(p) Min. Evid. 1806, p. 24.

(q) See on the Transmission and State of these Registers, *post*, part 3.

(r) Le Marchant's Report of the Gardner Peerage, p. 6. Printed ed. p. 97.

(s) See the forms in Smith's Chancery Practice, vol. i. p. 527.

(t) Alsop v. Bowtrall, Cro. Jac. 542.

(u) Willes, 549.

(v) See on this rule Co. Litt. 243 b. 2 Bl. Coyn. 248. In the case of *Pride v. Earl of Bath*, 1 Salk. 120, it was held that the rule, that a man shall not be bastardized after his death, applies only to the case of *bastard eigne et mulier puisne*.

(w) Stat. of Merton, 20 H. 3, c. 9. Co. Litt. 245 a. Bracton, 63, 416. 2 Inst. 96.

(x) According to Mr. Burge's learned work, legitimation *per subsequens matrimonium* is admitted, with different modifications by the laws of Scotland, France, Spain, Portugal, Germany, and most other countries in Europe. It prevails in the Isle of Man, Guernsey and Jersey, Lower Canada, St. Lucia, Trinidad, Demerara, Berbice, the Cape of Good Hope, Ceylon, and the Mauritius. It is not admitted by the law England, or of her other possessions in the West Indies and North America, or by the law of Ireland. It prevails in the



occasionally gives rise to questions, by what law the legitimacy of children, and (which it will appear is not quite synonymous) their inheritable capacity, are to be determined.

The three following cases in this country (y) appear to have definitively settled, that the *status of legitimacy or illegitimacy* is to be determined by the law of the domicile of origin:—

In *Sheddon v. Patrick*, (z) the issue born in New York of unmarried parents, who afterwards intermarried there, such marriage not rendering them legitimate in America were held not to be legitimate in Scotland. In the *Strathmore* case, (a) the son of Lord Strathmore, born in England of parents domiciled here, was held not to be legitimated by the subsequent marriage of his parents solemnized in England, and therefore not entitled to succeed as heir to his father's peerage and estates. It is to be observed, that in both these cases the marriage, as well as the birth, had taken place in a country which did not recognize the doctrine of legitimation: but in the latter case, Lords Eldon and Redesdale principally founded their judgments upon the law of the domicile of origin.

In *Munro v. Ross*, (b) a Scotchman domiciled in England, had a child born in England by an unmarried woman whom he afterwards accompanied to Scotland, and during a short residence there married. In a question of heirship to land in Scotland, the Court of Session held the issue legitimate and inheritable. But their decision was reversed [ \*369 ] by the House of Lords, on the ground that \*the *status* of bastardy, and the incapacity to become legitimate, had been impressed on the respondent by the law of England, which was his domicile of origin, and that the celebration of the marriage in Scotland did not remove that disability.

So far the decisions proceeded upon the principle, that legitimacy or illegitimacy is a personal *status*, impressed upon the party by the law of the country of his birth accompanying him into every other, and to be there determined by reference to the former law.

In the next case, the principle is apparently departed from, but the decision is made to rest upon different grounds. The lessor of the plaintiff, John Birtwhistle, was born in Scotland. His father was a native of England, but was domiciled in Scotland at the time of his son's birth, and continued so domiciled up to the time of his own death. The mother was a native of Scotland, and also domiciled there. The parents, some years after their son's birth, intermarried in Scotland. The father died seized in fee of certain lands in Yorkshire, for which the son brought ejectment as the heir. There was no doubt that he was a legitimate child according to the law of Scotland, and capable of inheriting lands there, and the sole question was, res-

states of Vermont, Maryland, Virginia, Georgia, Alabama, Mississippi, Louisiana, Kentucky, Indiana, and Ohio, but not in the other states of America. 1 Burge's Commentaries, 101. And see Butler's note to Co. Litt. 245 a.

(y) The foreign authorities upon this point are collected by Mr. Burge, 1 Comm. c. 3, s. 3. (z) Dict. Dec. For. App. n. 6, 1 July, 1803, cited 5 B. & C. 444, (11 E. C. L. R.) 2 Cl. & Fin. 579, S. C.

(a) 4 Wilson & Shaw, Ap., No. 5. See Earl of Strathmore v. Countess of Strathmore, 2 Jac. & W. 541.

(b) Fac. Coll. 15th May, 1827. 5 Shaw & Dunlop, 605. 4 Wilson & Shaw, 289, and App. 3, 4.

pecting his inheritable capacity by the law of England, where the lands were situate; and the Court of King's Bench held that he was not entitled to recover the lands as heir of his father.

This judgment of the Court of King's Bench proceeded on the grounds, that questions on real rights must follow the law of the country where the land lies; (c) that by the law of England, it is not sufficient, that he who claims in the character of heir should be legitimate, but legitimacy *sub modo* is necessary—the heir must be a child born after marriage. The principal authorities relied on for this position were, the Statute of Merton, and the definition of heirship by Glanville, and the other ancient text-writers, and by Lord Coke, "*Heres est qui ex justis nuptiis procreatus.*"

The case has since been brought by writ of error before [ \*370 ] the \*House of Lords. The opinion of the judges having [ \*370 ] been required was delivered by Lord Chief Baron Alexander: (d) There were two questions to which their attention must be directed separately and in succession to each other. The first in order regarded the *status* or condition of the claimant; the second was, what rules of inheritance the law of the country where the property is situated and the tribunal sits had imposed upon the land the subject of claim.

As to the first, their opinion was, that the *status* or condition of the claimant must be tried by reference to the law of the country where it originated. This inquiry was satisfied: it was ascertained that the claimant was the eldest legitimate son of his deceased parent, for the purpose of taking land, and for every other purpose by the law of Scotland.

With respect to the second question they held, that by the law of England a man is not the heir to English land, merely because he is the eldest legitimate son of his father. "We must look further, and ascertain whether he was born within the state of lawful matrimony: because, by the law of England, that circumstance is essential to heirship. The claimant being unable to prove himself in this condition, could not therefore, succeed as heir to land in England." The consistency of this opinion with the case of *Sheddon v. Patrick* and the *Strathmore* case, was thus endeavoured to be shewn:—"The Scottish law admitted no heirship without legitimacy; but the character of illegitimacy attached to the persons of the English and American claimants by their own law, accompanied them every where, and would prevent their being received as heirs every where, within the limits of the Christian world."

Lord Brougham dissented from this opinion of the judges, and some of his views Lord Lyndhurst thought were very striking: they required, he said, very full and patient consideration, and no pains should be spared to arrive at the proper result. Lord Denman also said, that the importance of the case was such, and the [ \*371 ] \*doubts which existed were so considerable, that they [ \*371 ] ought to be further investigated before the case was decided. The case was, therefore, ordered to be further argued in the House of Lords before the judges. (e)

(c) See 2 Ves. & B. 127.

(d) 2 Cl. & Fin. 573.

(e) *Birtwhistle v. Vardill*, 9 Bligh. 86. 2 Cl. & Fin. 585, S. C.

In stating the reasons of his dissent Lord Brougham said:—"Legitimate son means lawful son, and the rule of inheritance is, that the eldest lawful son shall succeed to the father, but lawful or not depends upon the law which is to govern; and no other definition can be given of what is lawful than this, that he is lawful son whom the law declares to be such. What law? There are two, it is said, in this case;—the law of the place of the party's birth and of his parent's marriage, and the law of the place where the land lies. Then which of these two laws shall prevail? The whole inclination of every one's mind must be towards that law which prevails where each person is born, and where his parents were married, supposing the countries to be one and the same; and if they differ I should then say, certainly the law of the birth-place. Nor can anything be more inconvenient or more inconsistent with principle than the inevitable consequence of taking the *lex loci rei sitæ* for the rule; because, this makes a man legitimate or illegitimate according to the place where his property lies, or rights come in question; legitimate when he sues for distribution of personal estate,—a bastard when he sues for succession to real; nay, legitimate in one country where part of his lands may lie, and a bastard in some other where he has the residue. So, in like manner, all who claim through him must have their rights determined by the same vague and uncertain canon—a circumstance which I no where find adverted to below. All the learned judges proceed upon the case being one of an inheritance claimed by the party himself: but what if he were dead years ago, and another claimed an estate in England, to which he (the alleged bastard) never had been, and never would have been, entitled? An estate, for example, descending from a collateral, who took it by purchase after the death of the alleged bastard. Then the pedigree of the claimant must be made out through legitimate persons, and the question of [ \*372 ] legitimacy is raised as to one who is not himself claiming any land—who never did or could claim any land, and it is not raised in respect of any right in him to inherit—any right to be called the heir to any land.

"It is thought enough to say, the heir is he who is born in lawful wedlock *ex justis nuptiis*. Then what is lawful wedlock?" His lordship then proceeds to shew that, by the law of Scotland, the ceremony of marriage after the birth of children raises a legal presumption, that there was a consent (by which alone matrimony is perfected) before the birth, and at the cohabitation, and that the ceremony is only evidence of the previous consent and contract. And he observes, that in that case, the law of the country where both the marriage and the birth took place declares, that the party was born in lawful wedlock—that he was *ex justis nuptiis procreatus*. The consequences of the doctrine were, "not only that the same party is legitimate in one country and bastard in another, but that in one and the same country he is to be regarded as bastard when he comes into one court to claim an estate in land, and legitimate when he resorts to another to obtain personal succession: nay, that in the same Court of Equity, where the real estate happens to be impressed with a trust, must view him as both bastard and legitimate in respect of a succession to the same interest. Another consequence is, that a descendant of this same

bastard may claim through him as if he were legitimate, while the alleged form of the statute of Westminster, and of Lord Coke's commentary thereupon, excludes him from taking it himself. In the same country, in the same courts, he is both bastard and legitimate; bastard for the purpose of his own succession, legitimate when the succession of others is concerned."(f)

It will be observed, that Lord Brougham assumes that the maxim "*hæres est qui ex justis nuptiis procreatus*" has only a personal application, and that it required this legitimacy *sub modo* only in the heir himself, whilst a general legitimacy would suffice in any ancestor through whom he deduced his descent. And this assumption seems to be warranted by the silence of Lord Coke and the other writers who notice the maxim, and \*who no where extend it further than to the person of the heir. But it is an impor- [ \*373 ] tant circumstance that by the old law no such confusion attended its application as that which might in the way which has been described follow it in this case. And there are other considerations, which shew that it may have had more weight given to it in the decision just quoted than it originally carried.

The use of the term *justis* in the maxim *hæres est qui ex justis nuptiis procreatus*, of itself proves that it could not apply to cases in which the lawfulness of the marriage was immaterial: and the authorities concur in shewing that a lawful marriage was required for the purposes of legitimacy only when *general* bastardy was pleaded. In pleading either kind of bastardy, issue could not be taken upon the lawfulness of the marriage. And in special bastardy it could not come in question, because special bastardy was triable *per pais*, and a jury could not decide whether a marriage was lawful, that is, whether it was a regular marriage according to the canon law. Accordingly we find that the averments in the pleadings, and the form of the issue present a latitude as to the nature of the marriage, which was obviously designed; they were, that the party was born *extra omnia sponsalia*, to which it was replied that he was born *infra sponsalia*:(g) and hence the reasoning of Britton, that the son of parties privily espoused was inheritable, because he could aver that he was born within espousals, although such espousals were not solemn.(h) In general bastardy triable by the bishop, the issue was not in the form, the objection to which led to the Statute of Merton, whether the party was born before or after lawful matrimony, but whether he was bastard or not.(i) But it appears that the matter to be tried by the ordinary was, whether the party was born in lawful matrimony.(j)

Now, the certificate of the Ordinary, that the party was [ \*374 ] a \*bastard, was peremptory to him forever.(k) Its conclusiveness was such as to have given rise to some abuses which it was found necessary to correct by statute.(l) And as it was not

(f) *Birtwhistle v. Vardill*, 9 Bligh. 72. 2 Cl. & Fin. 585. 595.

(g) 1 Rast. Ent. 387.

(h) Ante.

(i) Ibid. 279. 289.

(j) *Ne unusquisque accouple* in lawful matrimony is no plea but in dower or appeal, and not to bastardize any man: but he shall plead bastardy expressly, generally or specially. *Brooke's Bastardy*, pl. 9. *Repertorium Canonieum*, c. 25, pl. 6.

(k) *Com. Dig. Bastard* (D. 2.)

(l) 9 Hen. 6, c. 11.

reasonable that a party should have his *status* so fixed in a proceeding which did not give him the opportunity of being heard, it was the rule, that where bastardy was alleged in a dead person, a stranger to the action or an infant, it was to be alleged specially and tried by the country, and not by the bishop.<sup>(m)</sup> "General bastardy could only" in the words of Eyre, C. J., "be objected in real actions, and then only when the alleged bastard was alive and of age, and a party to the suit."<sup>(n)</sup>

The want of lawfulness, therefore, in his parents' marriage would operate merely as a personal defect,<sup>(o)</sup> which, unless objected under this combination of circumstances, could not be remitted to the cognizance of the Ordinary, and could not, therefore, prejudice the inheritable capacity either of himself or his issue, because, if questioned on any other occasion, the only jurisdiction was excluded which treated and could try such defect as conclusive of bastardy. If, therefore, it was not made the subject of adjudication and sentence in a proceeding to which the alleged bastard was an adult party, it was cured forever.

It has been observed, that the plea of general bastardy, and the trial by certificate, was confined to real actions. Accordingly it was said, bastardy is no plea in trespass, but shall conclude to the frank tenement: for if this shall be a plea, then writ shall be awarded to the bishop for the trial of it, which was never seen in trespass.<sup>(p)</sup> It followed, that in ejectment, which, though called a mixed action, is more properly personal, and merely a species of trespass,<sup>(q)</sup> the lawfulness of marriage was immaterial, and the issue of irregular or *de facto* marriages were legitimate.<sup>(r)</sup>

[ \*375 ] \*There are, therefore, solid grounds for the opinion [ ] that the rule requiring that the heir should be *ex justis nuptiis procreatus*, applied only to real actions, where alone there could be a conclusive sentence of bastardy, and where no discrepancy took place between the rights of the party himself and those who claimed through him, because they would be equally bound with their ancestor by such a sentence.

But in the present case, which is one of ejectment, if it be admitted that the general *status* of legitimacy is to be determined by the law of the domicile of origin, then to go further and require that the heir should be legitimate *sub modo*, would be to apply the maxim which has been cited, without the rule respecting the conclusiveness of the certificate of the Ordinary, which alone made it reasonable and consistent.

The certificate of the Ordinary in the trial of general bastardy, corresponded to a proceeding in the civil law, which was in the nature of a judgment upon the *status* of the party, and determined such *status* conclusively against all the world. In Scotland a similar proceeding takes place under the name of a declarator of legitimacy.<sup>(s)</sup> It was

(m) Ibid. and Tit. Certificate (A. 2.) 2 H. Bl. 156.

(n) Ilderton v. Ilderton, 2 H. Bl. 156.

(o) De Grey, C. J., speaks of the trial by certificate being confined to the legality of a marriage or its immediate consequences, general bastardy. 20 How. St. Tr. 538.

(p) Brooke Bastardy, pl. 14.

(q) Stephen on Pleading, App. n. (3).

(r) See cases cited ante, p. 311, et seq.

(s) Ersk. Inst. 6. 1. tit. 5. 5. 29.

necessary, however, by the civil law, that all persons primarily and substantially interested in the jurisdiction, whom the civil law describes as *justi contradictores*, should be parties to the suit, and if they were made parties, but did not appear, the judgment was conclusive against them alone; and the question of *status* must be the principal, and not an incidental or collateral object of the suit or judgment.(t) The opinion has been intimated that the effect of judgments or sentences pronounced in suits of this description, which had been only instituted or prosecuted, would be recognized by the judicial tribunal of a foreign country in every case in which they had been conclusive in that country where they had been pronounced.(u) But if the lessor of the plaintiff, in the case of Doe dem. Birtwhistle v. Vardill, had obtained, as he undoubtedly might have done, a declarator of his legitimacy in Scotland, his position would not have been [ \*376 ] improved, \*since his legitimacy was not disputed, but the additional quality of post-nuptial birth was considered essential to his title.

Upon the case being re-argued before the House of Lords, in the presence of the judges, questions were framed for their opinion, which was afterwards delivered by Lord Chief Justice Tindal. He said:—“That since the last argument they had had the misfortune to lose Mr. Baron Vaughan, but that as that learned judge had, within a few days after the argument, expressed his concurrence with the opinion now about to be stated to their lordships, the authority of his name might be added to the rest, that the person born under the circumstances stated in the case could not succeed to real estate in England. This opinion rested on the rule or maxim of the law of England, that the son, in order to succeed as heir, must be born after the actual marriage of his father and mother; this was a rule regulating the descent of real property which could not be disturbed by the laws of the country where the party was born, and which may be allowed to govern his personal status by the comity of nations.” His lordship here cited *Mirror of Justices*, p. 70; *Glanville*, b. 7, c. 14, and quoted the form of the ancient writs directed to the bishops, to inquire into cases of alleged bastardy, and mentioned the decree of Pope Alexander, and the necessity thereby created for the passing of the statute of Merton. Soon after the passing of that statute the question of bastardy came to be decided in the King's Court instead of the Ecclesiastical Courts. But at the time of the passing of that statute Normandy, Aquitaine, and Anjou belonged to the crown of England. Many of the English nobles were of foreign lineage, if not of foreign birth, and had possessions in those provinces as well as in this country. The civil law, which allowed legitimation by subsequent matrimony, prevailed in those provinces, and it was of course a matter which much concerned those nobles to determinate by what rule the descent of their lands in England should be governed; yet at the time of the passing of the statute of Merton, no words were introduced into it to except from its general provisions cases like the present, but the law was allowed to be laid down broadly in the form in which it was now found to exist. The practice of the Courts from that time had \*been in accordance with this broad statement of the [ \*377 ]

(t) *Burge Comm.* 91.(u) *Ibid.* 92.

law, and Lord Coke (2 Inst. 93) states that William the Conqueror, though legitimated in Normandy by the subsequent marriage of his father and mother, was not legitimate by the law of England; that was in effect saying, that, though being born in Normandy and legitimated there he could inherit lands in that province, he could not do so in this kingdom. This was in fact, therefore, the very case which had been put by the House before the judges for their consideration. The judges were further of opinion, that such being the law of the country it could not be contended, with reference to the inheritance of lands, that the personal status of legitimacy being conferred by the law of the country of the birth, that status must not only be recognized by every other country, but must be allowed in all other countries all the consequences that would follow it in the country in which that status was conferred. Under all these circumstances the judges were of opinion that the party in this case, though legitimated to all purposes whatever in Scotland, had not become entitled by the law of England, which must govern the descent of land in this country, to inherit land here; therefore the judges were of opinion that B. is not entitled to the real property as heir of A.

The case afterwards stood for judgment, and Lord Brougham declared that the doubts which he had entertained when the case was before the House on the former occasion had not been removed. The privileges granted by the common law to the bastard eigne favoured the doctrine, that the status of the person once established, the title to inheritance followed. The Lord Chancellor, however concurred with the judges, and moved that the judgment of the House should be given for the defendant in error, and the judgment was affirmed accordingly.(v)

[ \*378 ]

## \*CHAPTER V.

## OF THE PROOF OF CONSANGUINITY.

THE most convenient order of treating the different parts of this subject seems to be to examine first, the nature of the evidence of consanguinity in general; and secondly, the modes of proving those special qualities of consanguinity which, according to the rules governing the succession or prescribed by the settlor or testator, give the possessor a priority over the other kindred of the *propositus*.

## SECTION I.

Filiation being demonstrably the sole constituent of all real consanguinity, as well lineal as collateral, the evidence of a relationship by blood, in any degree, must have for its single object the occurrence of the several filiations by which the related parties are descended the one from the other, or both from the same ancestor. Evidence of consanguinity may, indeed, be adduced, which does not particularize

(v) Dom. Proc. 10th August, 1840.

or separately prove some fact of filiation; but this species of fact is, nevertheless, the subject of such evidence, for a declaration expressing, or a circumstance tending to shew that A. was the grandson, nephew, or cousin of B. supposes the several conjunctive filiations by which the relationship was constituted: the existence of the unmentioned steps of descent appearing by evidence which implies that they are overleapt.

The fact itself of filiation, as must appear upon the least reflection, is subject to peculiar difficulties in evidence, to the extent [ \*379 ] indeed, of having originated the maxim, that its proof is impossible. *Filiatio non potest probari* is the constant burden of the civilians, and is adopted by Lord Coke and Lord Nottingham.(w) And the circumstance is striking, that a man's natural origin, which imparts rights and imposes obligations of the first importance, rests in all cases upon evidence of a quality inferior to that by which ordinary legal questions are determined. "It would be impossible," said Lord Erskine, "to prove descents according to the strict rules by which contracts are established and rights of property regulated, requiring the facts from the mouth of the witness who had the knowledge of them."(x) And this not only because such facts as conception, birth, and personal identity for the most part elude the application of direct evidence, but also because the importance of the facts, and occasions of proving them, so frequently survive those who were the sole depositories of the imperfect evidence of which the facts are capable.

The evidence of filiation being thus defective and perishable, the law, yielding to the necessity of the case, introduces presumptions, and admits of the inferior evidence of hearsay and reputation, by the aid of which the rights which flow from natural origin are established or defended, and it has been in this, as in other civilized communities, the endeavour of the legislature to provide some general and certain means of taking and recording the best attainable evidence of the fact whilst it is of recent occurrence, and before any temptation to misrepresent it has apparently arisen. In England this important duty was, until recently, imperfectly performed by the parochial registration of baptisms. The nature of the evidence which they afford, and the improvement effected by the act which provides for the registration of births will be considered in the third part. But it is material to observe here, that the absence of a baptismal or natal register has merely the effect of compelling resort to be made to other [ \*380 ] evidence.(y) And even in criminal cases the want of a register is not a fatal defect, but may be supplied by the acknowledgment of parents and the declarations of relatives.(z)

(w) Co. Litt. 126. Case of the Purbeck Viscounty.

(x) 13 Ves. 143. Bartolus, in Cod. 8, 2, 1, excepts the fanciful case of a child being born of parents imprisoned alone together for the requisite period. But evidence, in its nature circumstantial, is not, by the certain conviction which it may produce, elevated into direct evidence.

(y) By the civil law, the want of the *professio natalium*, or of the *tabula nuptiales* had not more important consequences. *Si vicinis vel aliis scientibus, uxorem liberorum procreandorum causâ domi habuisti, et ex eo matrimonio filia suscepta est; quamvis nepue nuptiales tabulæ, neque ad natam filiam pertinentes factæ sunt non ideo minus veritas matrimonii aut susceptæ filia, suam habet potestatem.* Cod. 5, 4, 9.

(z) *Burgess v. Burgess*, 1 Hagg. C. R. 384, (4 E. Ecc. R.)



In considering the evidence of this fact, a difference must be observed in the outset between paternal and maternal parentage. *Procreatio non cadit in certum sensum hominis*,<sup>(a)</sup> and the policy of the law in questions of legitimate succession excluding the testimony of the mother upon the subject, direct evidence of paternal parentage is unattainable, or, to the extent to which it is attainable, inadmissible. But maternal origin or birth is perceptible, and may be proved by witnesses. This difference is recognized in maxims expressing that maternal parentage might be ascertained by evidence, but paternal must be determined by presumption. In the words of John Voet, *mater naturaliter certa est, pater ex presumptione censetur*,<sup>(b)</sup> following the Digest, which says of the former parent, *semper certa est, etiam si vulgò conceperit: pater verò is est quem nuptiæ demonstrant*:<sup>(c)</sup> and by the same law, upon the principle, which however is repudiated by Fortescue,<sup>(d)</sup> that evidence is preferable to legal presumption, the rule was *partus sequitur ventrem*: the children even of married persons took their civil condition from the mother and not from the father: those of a bond-man and a free-woman were free: of a free-man and a bond-woman slaves. On the ground also that the mother was sufficiently certain, bastards were admitted to succeed to the whole of their unmarried mother's inheritance, unless she was of noble rank.<sup>(e)</sup> The English law, though not to this extent, yet recognizes in several instances the more certain relation of a bastard to his mother than to his father.<sup>(f)</sup>

[ \*381 ] \*To remove the natural uncertainty as to the person of the father was most probably a primary end, and is usually placed among the most valuable uses of marriage.<sup>(g)</sup> Without the presumption that the wife's children are the husband's, which the laws of all civilized countries attach, with varying strictness, to the existence of the matrimonial contract, there could be no assurance of paternal relationship, nor consequently of agnate consanguinity. Accordingly, when deprived of the aid of this presumption the paternity of offspring was considered in the civil law as legally incapable of proof. When Claudius, who was born of a woman not the wife of the testator, was instituted heir, provided he could prove himself to be the testator's son, it was decided that the performance of the condition being impossible, the testament was nugatory.<sup>(h)</sup> By the English law also, on the same principle, a bequest to the children of A. by a particular man, not her husband, is void, if they have not previously acquired the reputation of being his children.<sup>(i)</sup> But this objection, which is one of uncertainty of description,<sup>(j)</sup> does not prevail where the issue are described without reference to any father, as where the bequest is to the child of which A. is enceinte, in which case, although no reputation can have been acquired, the bequest will be sustained.<sup>(k)</sup>

(a) Bartolus in Cod. 8, 2, 1, n. 1 & 2. Baldus Cons. 74, c. 1, l. 1.

(b) Ad. Pand. Lib. 1, tit. 6, n. 7.

(c) Lib. 2, tit. 4, l. 5.

(d) De Laudibus, c. 42.

(e) Code, 6, 57, 5. Inst. 3, 3, 7 & 3, 4, 3. Nov. 89, 8. In Holland Bastards still inherit to their mother. Van der Linden, Inst. by Henry, p. 165.

(f) 1 Bac. Ab. Bastardy (B.) 2 Pow. Dev. 364. Dalton, c. 91. Crompton, 21.

(g) Bolingbroke's Philosophical Works, Essays, XVII.

(h) Dig. 35, 1, 83.

(i) Earle v. Wilson, 17 Ves. 532. Wilkinson v. Adams, 1 V. & B. 422, 12 Pr. 470.

(j) See Harg. n. (1.) Co. Litt. 33.

(k) Gordon v. Gordon, 1 Mer. 141.

Before examining the cogency of the presumption of paternity from marriage, it will be convenient to mention the modes of proving filiation, in cases where the presumption does not come in question.

Direct evidence of maternal parentage, as the testimony of the mother herself and of persons present at the birth, is sometimes attainable, and is, of course, proof of the best quality. Cases in which such evidence is required, are in general questions, either of alleged *partus suppositio*, or of disputed identity. In *Day v. Day*, which was one of the former kind, on the trial of the first ejectment, before Lord Loughborough, (l) the mother of the \*defendant was examined, [ \*382 ] and swore that she was delivered of a boy, and that it was the same child as was then in possession of her husband's estate.

It will however be observed that in every case of *partus suppositio*, the child has in his favour the acknowledgment of the supposed parents, because that acknowledgment is of the essence of the fact: and their evidence is not more conclusive where it is repudiative of filiation than where it is affirmative of it. (m)

It is an inflexible rule that neither husband nor wife is competent to give evidence upon the fact of intercourse. Lord Mansfield said that it was a rule founded in decency, morality and policy, that persons shall not be allowed to say after marriage that they have had no connection, and that therefore the offspring is spurious; more especially the mother who is the offending party: and he stated that the point was solemnly determined at the Delegates. (n) In several other cases it has been held that married persons cannot be heard upon this fact. (o) The grounds upon which this testimony is excluded seem to be that, should the evidence be affirmative of the husband's paternity, it would be irrelevant, as proving that which the law presumes; and should it disprove the fact of sexual intercourse, it would be liable to objection, both on the ground of interest and of contrariety to public policy. (p) A \*separate objection has been taken where [ \*383 ] the subject matter of the declaration is not the fact of intercourse, but the absence of opportunity for it, in which case it is said that the want of access, implying the continued separation of the parties, must be notorious to the whole neighbourhood where they resided,

(l) At Huntingdon, 1784. Report of the case, 3rd ed. 1826.

(m) See Per Lord Nottingham, post, p. 390. The presumption from treatment, according to the civilians, holds *etiamsi mater et maritus cum juramento negarent esse filium*, Masc. Cœocl. 790; Menoch. lib. 6, pr. 53. And a French case is mentioned in the *Dictionnaire des arrêts*. Voce, supposition, where a child was maintained in possession of her status, upon presumptive evidence only against the dying declaration of the apparent father, and the living testimony of the mother, both disaffiliating her.

(n) Goodright v. Moss, Cowp. 594.

(o) Rex v. Reading, Ca. tem. Hardw. 79. Rex v. Rook, 1 Wils. 340. Rex v. Bedell, Lee's Rep. tem. Hardw. 379; 2 Strange, 941, 1076. Rex v. Kea, 11 East, 133; 8 Mod. 180, Bull. N. P. 113. This rule of evidence has, like most others, been set at nought in the parliamentary investigation of truth. Upon the examination of witnesses in support of a bill for the illegitimation of the children of Lady Ann Roe, the House of Lords admitted Lord Roe himself to state upon oath, that "since the 4th of March, 1659, and several months before, he had no carnal knowledge of his wife, the Lady Anne Roe." The House then "being satisfied concerning the truth of the matter of fact contained in the said bill, ordered it to be engrossed," and it shortly afterwards was read a third time, passed the Commons, and received the royal assent. Lords' Journals XII. 68, 71, 95, 110.

(p) Rex v. Reading, Ca. tem. Hardw. 79. Stapleton v. Stapleton, Ibid. 277. Stevens v. Moss, Cowp. 593. Rex v. Luffe, 8 East, 202. There was the same rule in the civil law. Dig. 1, 22, 3, 29. Code, 2, 4, 26. Ib. 8, 47, 6, 9 and 10.

and therefore capable of better proof.(p) And it has recently been held that the testimony of the parties is inadmissible, not only as to the principal fact, but also respecting any collateral fact, such as the place of their respective residence at a particular time, from which non-access is the proposed inference.(q) The rule is the same though the husband be dead when it is proposed to examine the wife.(r)

But if non-access is set up on the other side, the wife has been thought competent to prove access.(s) The rule has, however, since been laid down in terms which would exclude this evidence.(t)

The wife's testimony has been thought admissible to prove that "the adulterer alone had that sort of intercourse with her, by which a child might be produced within the ordinary period."(u) But it would appear that in order to make this evidence available the fact of non-access must be established by other witnesses, for the sole testimony of the wife will not be admitted to bastardize her issue.(v)

It would appear that the admissibility after the parties' deaths of their declarations upon this subject, is regulated by the admissibility [ \*384 ] of their testimony when alive. Mr. Justice Alderson \*indeed, recently rejected the declarations of a deceased wife, tending to shew that her son was not begotten by her husband, but by another man: but it does not appear what was the fact declared to, and the admissibility of her declaration as to the mere fact of adulterous intercourse would seem to be undoubted.(w)

It is necessary to notice the question of the admissibility and force of personal resemblance and native or congenital characteristics, as evidence of descent or consanguinity. Lord Mansfield, in the Douglas cause, said that he had always considered likeness, as an argument of a child's being the son of a parent: in other cases, if there should be a likeness of features, there might be a discriminancy of voice, a difference in the gesture, the smile, and various other things; whereas, a family likeness ran generally through all these; for in every thing there was a resemblance, as in features, size, attitude and action. Accordingly, he allowed in his judgment for the appellant considerable weight to the proved resemblance of him and his brother to Sir John Stewart and Lady Jane Douglas, and to their dissimilitude to the other persons whose children they were alleged to be.(x)

In ejectment, where the question was one of *partus suppositio*, Mr. Justice Heath, following this authority, admitted evidence that the defendant bore a strong resemblance to his supposed father, and in summing up, after observing that this evidence had been made light of, said, he admitted that resemblance was frequently fanciful, and

(p) *Rex v. Reading*, Bull. N. P. 113.

(q) *Rex v. Sourton*, 5 Ad. & Ell. 180, (31 E. C. L. R.)

(r) *Rex v. Kea*, 11 East, 132.

(s) *Pendrell v. Pendrell*, Str. 925. Bull. N. P. 287.

(t) *Per Littledale, J.*, 5 Ad. & Ell. 188, (31 E. C. L. R.)

(u) See *per Lord Ellenborough. Rex v. Luffe*, 8 East, 202. *Per Lord Hardwicke. Rex v. Reading*, Rep. tem. Hardw. 140. *Rex v. Rooke*, ubi sup. And see *Per Patteson, J.*, 5 Ad. & Ell. 184, (31 E. C. L. R.)

(v) *Rex v. Reading*, Rep. tem. Hardw. 82. *Rex v. Bedell*, 2 Str. 941. 1076. *Rex v. Luffe*, 8 East, 203. There was the same rule in the civil law. The sole confession of the mother, that the adulterer was the father, would not prejudice the child. Dig. 22, 3, 29. *Palmotes de Noth. et Spur. c. 24, n. 2.*

(w) See *Rex v. Sourton. Per Patteson, J.*, 5 Ad. & Ell. 184, (31 E. C. L. R.)

(x) 2 Coll. Jur. 402.

therefore the jury should be well convinced that it did exist, but if they were so convinced it was impossible to have stronger evidence.(y)

Both these cases, it will be observed, were questions of *partus suppositio*, and they do not therefore establish the admissibility of such evidence in cases of adulterine bastardy. According to some physiologists the influence of the mother's imagination upon the child's personal characteristics is such as to make its resemblance to a paramour consist with its legitimacy; and if this opinion be [ \*385 ] correct, \*similitude or dissimilitude of form and features is peculiarly uncertain and dangerous evidence of paternal descent, as between a husband and an adulterer. In a Scotch case, evidence of the child's resemblance to the adulterer was accordingly rejected though offered only in corroboration of other circumstances.(z) Yet, in the recent case of *Morris v. Davis*, evidence of the child's likeness to a portrait of the adulterer, given by him to the mother, appears to have been gone into, but probably no weight was given to it, and it is not noticed in the judgments.(a)

a. The result of the authorities in our law appears thus favourable to the admissibility of this evidence in questions of *partus suppositio*, and this limitation is warranted by the different opinions of the civilians.(b) The less scrupulous canonists, allowing little weight to the presumption of paternity from marriage, considered all evidence admissible, which in any degree tended to throw light upon their single inquiry; by whom did the mother conceive? and they accordingly received and acted upon evidence of the child's resemblance to the husband or adulterer.(c)

A consideration of the force of this evidence properly belongs to another profession, some distinguished members of which have observed, that peculiarities of form, feature and complexion, are frequently hereditary for many generations, even where there has been no restriction as to marriage; they adduce among others the instances of the thick lip of the imperial house of Austria, which prevailed for three centuries,(d) and of the stature of the inhabitants of Potsdam, where the gigantic guards of Frederick William I. were quartered for fifty years. But these peculiarities are still \*more obvious [ \*386 ] in races who marry within their own body, as the Jews and Gipsies.(e) And the clearly marked difference of form and colour between the grand varieties of the human species is such as to make

(y) *Day v. Day*, Huntingdon Ass. 1797. Printed Report, 3rd ed. p. 327.

(z) *Ersk. Inst.* 154, citing *Routledge*, 20 Jan. 1810. *Fac. Coll.*

(a) *Nicolas's Adulterine Bastardy*, 217.

(b) *Voet. ad Pand. Lip.* 1, tit. 6, n. 9, and *Mascardius* treating of adulterine bastardy pronounces it inadmissible, whilst *Tiraquellus* and *Zacchias*, in discussing the evidence of filiation, generally hold it admissible when accompanied by other proofs. *Zacch. Qu. Med. Leg. lib.* 1, tit. 2, qu. 4. and *Cons.* 60. And see 1 *Paris & Fonbl.* 220; *Beck.* 354. *Butler's Life of Grotius*, p. 166.

(c) See *Preface to Le Marchant's Gardner Peerage*, p. 28.

(d) *Lawrence's Physiological Lectures*, 447, et seq. *Haller's Elem. Physiol.* *White's Gradations of Man.* *James Percy*, a claimant to the earldom of Northumberland, adduced in proof of his descent that he was born with the same mark on his body "as other Percy's had been." 12 *How. St. Tr.* 1199. See further on this claim, *Lord's Journals* XII. 553. 578. XIV. 24. 38. 224. 240.

(e) *Tacitus* gives this reason for the uniformity of features which he observed among the ancient Germans. *De Mor.* 4.

resemblance in these particulars, evidence of the strongest kind, where the question is between parents of distinct races. In New York, a case of filiation was some years ago decided upon medical testimony as to the weight in evidence due to difference of colour.(f)

Cases of *partus suppositio* have been of singular infrequency in England, if it is considered that it is probably the only country in Europe in which the act is not criminal. It will therefore suffice to mention that it may take place in three ways. First, where a delivery is simulated, and a child produced as the fruit of it.(g) Secondly, where the delivery is real but the child dies and a living child is substituted.(h) Thirdly, where one living child is substituted for another, the motive to which may be a difference in sex, formation or apparent health, or some other cause of preference.

The relevancy and weight of the various kinds of evidence in these questions received the most elaborate examination in the memorable Douglas cause, decided by the House of Lords in 1769: and the proceedings form a body of learning which, the subject being of little practical interest, may rather be referred to than abridged.(i)

[ \*387 ] \*The case of the Viscounty of Purbeck involved the questions both of the paternal and maternal parentage of a child, and the facts, as far they have been transmitted, deserve mention, as introductory to the opinion of Lord Nottingham on the evidence of filiation.(j) In 1618, Sir John Villiers, eldest brother of the celebrated George, Duke of Buckingham, married Lord Coke's daughter Frances, and in the following year was created Baron Stoke and Viscount Purbeck, with a limitation to the heirs male of his body. Not long after the marriage, an ostensible separation took place, during which, as it was alleged, Lady Purbeck had a son, who was baptized by the name of Robert Wright. Her own account of the matter, as given in a petition presented in 1641 to the House of Lords,(k) was that she brought her husband a large estate, beside 10,000*l.*, that not long after their marriage her husband's mother and others "upon

(f) Beck. 354. Mental qualities are, perhaps, not sufficiently congenital to supply available evidence of descent. Yet the reader may recall to mind the fine invective of Junius, against the Duke of Grafton. "You have better proofs of your descent, my lord, than the register of a marriage, or any troublesome inheritance of reputation. There are some hereditary strokes of character by which a family may be as clearly distinguished as by the blackest features of the human face. At the distance of a century we see their different characters (those of Charles I. and II.,) happily blended in your Grace."

(g) Of this class was Chetwynd's case in Chancery and K. B. 1754, cited 1 Douglas Cause, 73, and those of Bourdelone, Rusca, and Vandermark, *Ibid.*, and of the Duchess of Rohan. Moreri's Dict. Voce Tancrede.

(h) In the cases of Haroward and St. Vidal, 1 Douglas Cause, 57. 65, and Day v. Day, Printed Report, ed. 3.

(i) The evidence and arguments are collected in several quarto volumes in the Inner Temple Library. The speeches of Lords Camden and Mansfield are in 2 Collectanea Juridica, 386. There were many controversial works on the case; and the final judgment drew forth Andrew Stuart's justly celebrated letters to Lord Mansfield.

(j) The case is best known as having raised the question of the effect of a fine levied of his dignities by a peer to the king, and as regards this point only is reported in Collier's Precedents, 293, and Shower's Parl. Cas. 1; and see 3rd Report on the Dignity of Peer, p. 43. Cruise on Dignities, and 3 Cruise Dig. tit. 26. On the question of filiation the fullest account is given in Nicolas on Adulterine Bastardy, p. 90; and in the Appendix, p. 420, to the report of the Gardner case, by Mr. Le Marchant, to whom the profession is indebted for the publication of Lord Nottingham's speech.

(k) Harl. MS. 4746. Lords' Journals, iv., 168, et seq. .

some pretence of weakness and distemper of her lord and husband, caused them to live apart, during which time they disposed of his estate, the most of which came from her father; and that being left destitute and otherwise ill-used, the Duke of Buckingham on the interference of King James, agreed to allow her one thousand marks per annum and her jewels, provided she would not "cohabit again with her husband," and that her annuity and possession of the jewels should cease on such cohabitation. To these terms, "though very unreasonable," her necessities obliged her to accede. And although sometimes she and her husband had the happiness afterwards to meet together, yet was the same concealed as much as might be to avoid the danger and prejudice she would have sustained by the discovery thereof." She then states, that when with child and near her delivery an act of great personal violence was committed upon her by the Countess of Bucks, Sir Edward \*Villiers and others, [ \*388 ] "which enforced her to withdraw herself to a private place, unknown to her adversaries, until her delivery, and to take upon her a feigned name both for herself and the son born of her body, and to pretend herself to have been the wife of John Wright, and the son born of her body to be entered in the register of the parish where he was christened by the name of Robert Wright; thereby to conceal both herself and child from their rage and fury, which she had just cause from her former barbarous usage to fear and suspect." Her delivery being discovered, a charge of adultery with Sir Robert Howard was made against her in the High Commission Court, where "by an unwarrantable and most illegal sentence she was condemned and fined 500*l.*, and unlawfully committed to prison, for inducing which sentence the prosecutors endeavoured, by negative proofs, to make appear that your petitioner and her husband did never meet together for above a year before her delivery, (thereby contrary to law, to blemish and asperse her issue, and contrary to the truth, as appeared by many affirmative proofs) and although your petitioner desired therein to be tried by her own husband, who best knew the truth thereof, yet would not that be granted her." To this statement of Lady Purbeck's wrongs must be opposed the testimony of contemporary writers tending to show that the imputation of adultery with Sir Robert Howard was not, at least after the birth of the child, wholly unfounded.<sup>(l)</sup>

The House of Lords took several proceedings upon the petition, the prayer of which was directed towards the security of her property, and the punishment of her adversaries, but the result does not appear. Lady Purbeck died in 1645, and her husband in 1657. Robert Wright, the child, was afterwards, according to Dugdale,<sup>(m)</sup> called "Villiers *alias* Wright," and having married Elizabeth, the daughter and heiress of Sir John Danvers, one of the regicides, obtained a patent from Oliver Cromwell, authorising him to abandon the name of Villiers, to assume that of Danvers, upon his allegation of hatred to the former in consequence of the injuries which the Villiers family had done to

(l) See Nicolas *Adult. Bast.* 91, citing *Strafford Papers*, vol. 1, pp. 390. 426. 434.

(m) *Baronage*, vol. 2, p. 432.

[ \*389 ] the Commonwealth. In the Convention Parliament, \*Robert Danvers was a member of the House of Commons, but in June, 1660, a charge being preferred against him in the House of Lords of having spoken certain treasonable words, that House, considering him to be a peer, as son and heir of Viscount Purbeck, ordered that he should be brought before them. He refused to come—was voted in contempt, and brought to the bar as a delinquent, when the information against him being read, he said that “he valued the honour of this House very much, but he hath no right himself to this honour of a peer, because he can find no patent for any such honours in the Petty Bag office, nor any writ.”—“That he had petitioned the king to give him leave to levy a fine to clear him of any title to that honour; and his Majesty hath made an order to the Attorney-General to that purpose: and the reasons (he said) to induce him to this were:—1. This honour was but a shadow without a substance. 2. His small estate was unfit to maintain any such honour. 3. That noble family he comes of never owned him, neither hath he any estate from them.” In petitions which he afterwards presented on the subject of this charge he styled himself “Robert Danvers *alias* Villiers, whom your lordships are pleased to honour with the title of Viscount Purbeck.”(n)

Robert Danvers died about 1675, having levied the proposed fine of the above dignities. His son and heir, Robert, a minor, then presented a petition to the Crown, claiming the dignities, and alleging the inefficiency of the fine to bar or extinguish them.(o) The claim was opposed on the grounds, 1st, that the fine had this effect, and secondly, that the petitioner's father was not the son of John First Viscount Purbeck. In 1678 the first ground was pronounced untenable by the unanimous resolution of the House.

With respect to the question of filiation it appears from Lord Nottingham's MS. that the Attorney-General, on the 5th of June, 1678, stated that the Duke of Buckingham, one of the opponents of the claim, desired to offer some further evidence as to the matter of fact: and [ \*390 ] shewed that the petitioner's father had \*exhibited a bill in Chancery against the grandfather; and the grandfather, by his answer upon oath, denied him to be his son; and the fact was relied on, that he was christened by the name of Robert Wright. The Attorney-General, Sir W. Jones, then concluded for the king, and said:—“As to the illegitimation of the petitioner's father he could not say much: for, without question, the wife's son is the husband's, if the husband were *infra quatuor maria*: and that the only use to be made of the evidence in this case is to consider how far it goes towards disproving him the wife's son.”(p)

Lord Nottingham, then Lord Chancellor Finch, delivered the following opinion: “The question whether there be a legitimate succession to this honour, is a question of fact, wherein the doubt is not, whether the petitioner be legal heir to his father, but whether the father were so to the grandfather: and therein it is admitted that the father

(n) Lords' Journals XI. *passim*.

(o) The proceedings which followed are contained in the Lords' Journals, XII. and XIII.

(p) There is a full report of the argument in Collins's Proceedings. 296. See also Shower Cas. Parl. 5.

is legally the son of the grandfather, if he can prove himself the son of the grandmother; and this fact is now called in question, and the grandchild after fifty or sixty years elapsed, is put to prove, not that his father was lawfully begotten (every one sees the danger of that) but which is all one in consequence, that his father was begotten of his grandmother. This ought not to be endured, for 1. *Filiatio non protest probari nec debet*: 2. It tends to defeat purchases made of the father as heir, &c. 3. He hath been found heir to the land, and son of the grandmother by a special verdict in 1635, in *Wegg v. Villiers*, (g) when matters were more capable of proof, old witnesses being since dead: 4. This should have been questioned if ever in the father's life, for he that is certainly a bastard, as being born before wedlock, yet if he die with the reputation of true heir, he cannot be bastardized afterwards, but his issue shall carry away the land from the legitimate heir, Litt. 5, Descents. 5. Strange questions are sometimes raised for crowns where armies dispute, but where a coronet only is at stake it is not to be suffered. The great objections are that he was baptised by another name, and that the grandfather denied him to be his wife's son, but though it may be a good cause to suspect adultery where too much secrecy \*is used at baptism, it is no case to make [ \*391 ] illegitimation. Again, the grandfather's denial upon oath is nothing, for if the grandmother had herself denied him to be her son, yet it had not been material, for still it is capable of disproof. It is disproved here by the verdict, by the nurse and midwife then produced, by the old Lady Hatton owning the child, who could not be in the secret, and by constant reputation. In the parliament of Paris, in the case of Madame de Cognac, (r) it was adjudged that the mother's disavowing her child should not prejudice the child who was able to disprove her. Nay, if the father himself had disclaimed his own legitimation, this ought not to prejudice the grandchild. (s)

The House decided against putting the question of the claimant's right to the dignities, but petitioned the king for leave to bring in a bill to disable him to claim them. The king, probably with the advice of the Lord Chancellor, returned the answer: "that he will take it into consideration." No further proceedings were taken. In 1708 the petitioner's son and heir, and after his death without issue male, his nephew, were claimants, but no decision was ever come to. (t)

The law has provided a preventive remedy against supposititious births in the writ *de ventre inspiciendo*. This writ issues out of Chancery and may be obtained on petition. (u) It is granted for the security of the heir; that is of him who is actually so by the death of his ancestor and not merely *hæres apparens*. (v) Originally it was issuable only on the heir's petition, but in later cases the benefit of it has been extended to *hæredes facti*, as devisees in tail in fee or for life. (w)

(g) 2 Rolle's Rep. 769. 2 Sid. 54.

(r) This case is stated by Mr. Le Marchant in his report of the Gardner claim, Ap. 496.

(s) Ibid. p. 422.

(t) Nicolas Adult. Bast. 112, 113.

(u) Ex parte Bellett, 1 Cox, 299, and see Mos. 393.

(v) Co. Litt. 8, b.; 6 Ves. 260; 15 Ves. 130.

(w) Ex parte Aisough, 2 P. Wms. 591; Mos. 391, S. C. Ex parte Bellett, 1 Cox, 297. Ex parte Wallop, 4 Bro. C. C. 90; 2 Dick. 767, S. C.



and it has been granted on the application of the attorney general for the protection of a charity,(x) and has also been extended to cases of personal estate.(y)

[ \*392 ] \*This writ in its ordinary application applies to cases where a woman soon after the death of her husband alleges herself to be with child by him. By the original frame of it the sheriff was commanded that in the presence of twelve knights and as many women, he should cause examination to be made whether the woman was with child or not: and if with child about what time it would be born, and that he certify the same to the justices of assize or at Westminster, under his seal and under the seals of two of the men present.(z) But as on the one hand its operation has been extended to cases to which it did not anciently apply, so on the other, it is not now necessary that it should be executed in its original strictness.(a) In one case it was ordered to issue against a married woman (whose husband had been nearly ten years abroad,) on the application of a devisee in a will, in which there was a limitation, that if she had a male child within forty weeks after the testator's decease, it should take before the devisee: but it was provided that the writ should remain in the office fourteen days, and if within that time she choose to submit to an examination by two midwives to be appointed by the petitioner, to inspect and examine by such examination as they should think necessary, whether she were pregnant, then the writ not to go till further orders, otherwise to issue.(b) But an heir apparent cannot have this writ during the life of his ancestor.(c)

The writ issues although the widow is married to a second husband, but the mode of executing it is in that case different.(d) And the Court thought itself at liberty on a recent occasion to soften the rigour of the common law, in the manner of execution by special directions according to the circumstances of the case.(e)

[ \*393 ] The subject of filiation must now be considered, with reference \*to the existing presumption of paternity, arising from birth in wedlock, and the rules which regulate the admission of evidence, and the nature of the evidence required to rebut such presumption.

The cogency of the presumption of paternal parentage from marriage, having upon several recent occasions been elaborately investigated, it appears to be sufficient to set forth what appears to be the *present* state of a part of the law, of which the history is an eminent example of the judicial power of legislation. Those who would minutely examine its changes, will find the cases chronologically arranged in Sir Harris Nicolas's *Treatise on Adulterine Bastardy*. This work will be found to give a better account of the history than

(x) *Attorney General v. Laroche*, cited 2 P. Wms. 591.

(y) Mos. 391; 2 P. Wms. 591; Co. Litt. 8, b. n. (3).

(z) The proceedings are fully stated in *Lady Willoughby's case*, Cro. Eliz. 566, and *Keaber's case*, Cro. Jac. 685; 1 Burn's Ecc. Law, 124; Co. Litt. 8 b.; Com. Dig. Bastard.

(a) 2 P. Wms. 593.

(b) *In re Brown ex parte Wallop*, 4 Bro. Ch. C. 90; 2 Dick. 767, S. C.

(c) 6 Ves. 260.

(d) Cro. Jac. 685.

(e) *In re Ann Fox*, by Sir L. Shadwell, V. C. 1836, MS. See the form of the writ, Reg. Brev. 227, a. And further upon it, 3 Harg. Jurisc. Exerc. 413. *Barrington on Stat.* p. 9. 1 Bl. Com. 456.

of the present state of this part of the law. The rule of *quatuor maria* has not, it is probable, many more supporters at the present day. Even Lord Eldon said that the law had been scrupulous about legitimacy, to the extent of disturbing the rules of reason. It is not easy to imagine a stronger condemnation of any doctrine which at any time formed part of the English law. The result seems to be, that the early writers, as Bracton and Fleta, recognize no such doctrine as that known by the name of *quatuor maria*, and that the law, therefore, as now settled in its repudiation of this doctrine, is in conformity with the most ancient authorities. The rule had its origin in the refinements of pleading. The presumption from birth in wedlock was held conclusive, unless met by averment of what was called special matter. This matter was confined, except in cases of divorce, to these two facts; the impotence of the husband, and his absence beyond the four seas during the time of conception, and according to some authorities, of gestation. The policy of the law, it has been observed, appears to have been, that no fact should be tendered in issue from which the illegitimacy was not the immediate and inevitable inference: or to use the language of a judge of those days, that all matter was irrelevant, which was only argumentative to prove the bastardy, for the party ought to *conclude and so bastard.*(f)

Yet even this policy seems insufficient to establish the reasonableness of the rule. For it would be difficult to contend that \*no fact short of the husband's absence beyond seas, could [ \*394 ] lead inevitably and immediately to the inference of non-access at the period of conception.

The doctrine of *quatuor maria*, is asserted without qualification by Lord Coke,(g) and it remained unquestioned until the time of Lord Hale, who has the merit of laying down the sensible rule, that if the husband, whether within the realm or not, had in fact no access to the wife, the child would be a bastard.(h) The old doctrine was disregarded in subsequent cases, and finally exploded by that of Pendrell v. Pendrell, before Lord Raymond.(i)

The principal question in the numerous cases which have occurred since that of Pendrell v. Pendrell, has been what evidence shall be deemed sufficient to establish the fact of non-access. In the cases of Lomax v. Holmden;(j) Smyth v. Chamberlayne;(k) Boughton v. Boughton;(l) Lloyd's case;(m) Head v. Head;(n) and Bury v. Philpot;(o) the evidence was deemed insufficient to rebut the presumption of legitimacy: and in Pendrell v. Pendrell, and Corbyn's case;(p) Rex v. Bedale;(q) Rex v. Lubbenham;(r) Goodright v. Saul;(s) Rex v. Luffe;(t) Rex v. Maidstone;(u) the Banbury Peerage case;(v) Clarke v. Maynard;(w) the Gardner Peerage case;(x) and Morris v.

(f) *Le Marchant*, Pref. to *Gardner Peerage*.

(g) *Co. Lit.* 244, a.

(h) *Dickens v. Collins*, cited 1 *Salk.* 123.

(i) 2 *Strange*, 925.

(j) 2 *Strange*, 940.

(k) *Gardner case*, App.

(l) *Ibid.* and see 3 *Taunt.* 342.

(m) *Gardner case*, 468.

(n) 1 *Sim. & St.* 150; 1 *Turn. & Russ.* 139.

(o) 2 *My. & K.* 349.

(p) Before Lord Talbot, cited by Lord Ellenborough in the *Banbury case*.

(q) 2 *Str.* 1076; *Andr.* 9.

(r) 4 *T. R.* 251.

(s) 4 *T. R.* 356.

(t) 8 *East*, 202.

(u) 12 *East*, 550.

(v) *Le Marchant's Gardner case*, App. *Nicolas Adult. Bast.* 291.

(w) 6 *Madd. & Geld.* 364.

(x) *Le Marchant's Report*, *Nicolas*, 209.

Davis;(y) the presumption was effectually encountered by the evidence adduced.

That a physical impossibility of the husband being the father, was not, even before the Banbury case, the sole means of rebutting the presumption of legitimacy further appears from a remarkable [ \*395 ] case mentioned by Lord Erskine,(z) as having happened during his practice at the bar. A child claimed as heir of A., begotten on the body of B., his wife, and produced as such on its birth; but proof was given that B. had been married to C. before her marriage with A., and that C. was living after the marriage, and the evidence of the former marriage destroyed the claim of the child as the legitimate child of A. A claim was then made for the child to other property, as the child of C., who was living, and in the neighbourhood of A., during the time of her pregnancy, and until the birth of the child; but the jury presumed from the fact of the second marriage, and the production of the child at its birth, as the child of A., that it was not the child of C.(a)

It is now unnecessary to look for the law upon this question beyond the answers of the judges in the Banbury Peerage case. Lord Lyndhurst recently said that he had looked attentively through all the subsequent cases, and that not one of them had broken in upon or impeached in the slightest degree the principles of law there laid down.(b)

The following are the questions put by the House of Lords to the judges in that case, and the answers returned thereto.(c)

On the 30th of April, 1811, the judges were asked: I. "Whether [ \*396 ] \*the presumption of legitimacy, arising from the birth of a child during wedlock, the husband and wife not being proved to be impotent, and having opportunities of access to each other during the period in which a child could be begotten and born in the course of nature, can be rebutted by any circumstances inducing a contrary presumption?"

The Lord Chief Justice of the Court of Common Pleas (Sir James Mansfield) having conferred with his brethren, stated, that they were unanimously of opinion, "That the presumption of legitimacy arising

(y) 3 Carr. & Payne, 218. 427, (14 E. C. L. R.); Nicolas, 216; Dom. Proc. 1837; 5 Cl. & Fin. 214.

(z) In the Banbury case and cited by Lord Redesdale in his speech in judgment in the same case, *Le Marchant's Gardner Peerage case*, App.

(a) From a recent decision, however, it would seem that the mere facts above stated, would not now be held sufficient to repel the legal presumption. Ann Fletcher was married in 1812 to Thomas Fletcher; in 1818, she was married to Henry Parsons, and cohabited with him from that time till 1832, during which period she had two children, who were christened by the names of Henry and Elizabeth Parsons, and never went by the name of Fletcher or any other name but that of Parsons. Fletcher was living at the time of the trial. Upon an appeal from an order of sessions, founded upon the presumed illegitimacy of the two children, the Court of Q. B. held that as Fletcher was still living and there was no evidence of non-access by him to the wife, the legal presumption of the legitimacy of the children could not be rejected. *Reg. v. Inhab. of Mansfield*, 1 Gale & Davison, 7. A case of the same nature was on May 20, 1842, brought before the House of Lords by a petition respecting the Townsend Peerage, from which it appeared that the person who claimed to be the eldest son and heir apparent of Lord Townsend, was born more than a year after his mother the Marchioness of Townsend had separated from the Marquis, and had cohabited with Mr. Margetts whom she had married.

(b) *Morris v. Davis*, 5 Cl. & Fin. 262.

(c) *Banbury Earlom*, Min. Ev. 1811; 1 Sim. & St. 153, 158.

from the birth of a child during wedlock, the husband and wife not being proved to be impotent, and having opportunities of access to each other, during the period in which a child could be begotten and born in the course of nature, may be rebutted by circumstances inducing a contrary presumption;" and gave his reasons.

The judges were then asked: II. "Whether the fact of the birth of a child from a woman united to a man by lawful wedlock, be always, or be not always, by the law of England, *primâ facie* evidence that such a child is legitimate; and whether in every case in which there is *primâ facie* evidence of any right existing in any person, the *onus probandi* be always, or be not always, upon the person or party calling such right in question. Whether such *primâ facie* evidence of legitimacy may always, or may not always, be lawfully rebutted by satisfactory evidence that such access did not take place between the husband and wife, as by the laws of nature is necessary in order for the man to be, in fact, the father of the child; whether the physical fact of impotency, or of non-access, or of non-generating access (as the case may be) may always be lawfully proved, and can only be lawfully proved, by means of such legal evidence as is strictly admissible in every other case in which it is necessary, by the law of England, that a physical fact be proved?"

The Lord Chief Justice of the Common Pleas delivered the unanimous opinion of the judges upon this question as follows: "That the fact of the birth of a child from a woman united to a man by lawful wedlock, is generally, by the law of England, *primâ facie* evidence that such child is legitimate. That in every \*case in [ \*397 ] which there is *primâ facie* evidence of any right existing in any person, the *onus probandi* is always upon the person or party calling such right in question. That such *primâ facie* evidence of legitimacy may always be lawfully rebutted by satisfactory evidence that such access did not take place between the husband and the wife, as, by the laws of nature, is necessary in order for the man to be, in fact, the father of the child. That the physical fact of impotency, or of non-access, or of non-generating access, as the case may be, may always be lawfully proved by means of such legal evidence as is strictly admissible in every other case in which it is necessary, by the law of England, that a physical fact be proved."

The judges were further asked: III. "Whether evidence may be received and acted upon to bastardize a child born in wedlock, after proof given of such access of the husband and wife, by which, according to the laws of nature, he might be the father of such child, the husband not being impotent, except such proof as goes to negative the fact of generating access?"

IV. "Whether such proof must not be regulated by the same principles as are applicable to the legal establishment of any other fact?"

In answer to the said questions, the Lord Chief Justice of the Common Pleas delivered the unanimous opinion of the judges on the same as follows: "That, after proof given of such access of the husband and wife, by which, according to the laws of nature, he might be the father of a child (by which we understand proof of sexual intercourse between them) no evidence can be received except it tend to falsify the proof that such intercourse had taken place. That such proof

must be regulated by the same principles as are applicable to the establishment of any other fact."

On the 30th of May, 1811, the two following questions were put to the judges: V. "Whether in every case where a child is born in lawful wedlock, sexual intercourse is not by law presumed to have taken place, after the marriage between the husband and wife (the husband [ \*398 ] not being proved to be separated from her by \*sentence of divorce) until the contrary is proved by evidence sufficient to establish the fact of such non-access, as negatives such presumption of sexual intercourse within the period, when, according to the laws of nature, he might be the father of such child?"

VI. "Whether the legitimacy of a child born in lawful wedlock (the husband not being proved to be separated from his wife by sentence of divorce), can be legally resisted by the proof of any other facts or circumstances than such as are sufficient to establish the fact of non-access, during the period within which the husband, by the law of nature, might be the father of the child; and whether any other question but such non-access can legally be left to a jury upon any trial, in Courts of law, to repel the presumption of the legitimacy of a child so circumstanced?"

The Lord Chief Justice of the Court of Common Pleas delivered the unanimous opinion of the Judges upon the last question as follows: "That in every case where a child is born in lawful wedlock, (the husband not being separated from his wife by a sentence of divorce) sexual intercourse is presumed to have taken place between the husband and wife, until that presumption is encountered by such evidence as proves, to the satisfaction of those who are to decide the question, that such sexual intercourse did not take place at any time when, by such intercourse, the husband could, according to the laws of nature, be the father of such child. That the presumption of the legitimacy of a child born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, can only be legally resisted by evidence of such facts or circumstances as are sufficient to prove, to the satisfaction of those who are to decide the question, that no sexual intercourse did take place between the husband and wife, at any time, when, by such intercourse, the husband could, by the laws of nature, be the father of such child. Where the legitimacy of a child, in such a case, is disputed, on the ground that the husband was not the father of such child, the question to be left to the jury is, whether the husband was the father of such child? and the evidence to prove that he was not the father must be of such facts and circumstances as are sufficient to prove, to the satisfaction of a jury, that no sexual inter- [ \*399 ] course took place between the husband and wife at \*any time, when, by such intercourse, the husband could, by the laws of nature, be the father of such child. The non-existence of sexual intercourse is generally expressed by the words 'non-access of the husband to the wife;' and we understand those expressions, as applied to the present question as meaning the same thing, because in one sense of the word 'access,' the husband may be said to have access to his wife as being in the same place or the same house; and yet, under such circumstances, as instead of proving, tend to disprove, that any sexual intercourse took place between them."

The Banbury Peerage case, is generally regarded as having unsettled the previous law, and introduced new rules for the government of these questions. There appears to be less justice in this observation as applied to the law laid down in that case, whether set forth in the opinions of the Judges, or in the speeches of the law Lords, than as applied to the decision upon the facts of the case. And whatever may be thought of the sufficiency or insufficiency of the premises from which the House of Lords drew their conclusion in that case, it is conceived that the rules of evidence by which those premises were admitted into the argument, were quite consistent with previous decisions upon the subject, from the case of *Pendrell v. Pendrell* downwards. Accordingly, in the decisions which have taken place upon this question since the Banbury case, the Judges have uniformly treated it as an authority declaratory of the old law, and not introductive of any new rules. "The ancient policy of the law," said Sir John Leach, "remains unaltered. A child, born of a married woman, is to be presumed to be the child of the husband, unless there is evidence which excludes all doubt that the husband could not be the father. But in modern times, *the rules of evidence* has varied. Formerly, it was considered all doubt could not be excluded unless the husband were *extra quatuor maria*. But, as it obvious that all doubt may be excluded from other circumstances, although the husband be within the four seas, the modern practice permits the introduction of every species of legal evidence tending to the same conclusion. But, still the evidence must be of a character to exclude all doubt; and when the Judges in the Banbury case, spoke of satisfactory evidence upon this \*subject, they must be understood to have meant [ \*400 ] such evidence as would be satisfactory, having regard to the special nature of the subject. It is to be deduced as a corollary, from the opinions of the learned Judges in that case, that whenever a husband and wife are proved to have been together, at a time, when in the order of nature, the husband might have been the father of an after-born child, if sexual intercourse did then take place between them, such sexual intercourse was *primâ facie* to be presumed, and that it was incumbent upon those who disputed the legitimacy of the after-born child, to disprove the fact of sexual intercourse having taken place, by evidence of circumstances which afford irresistible presumption that it could not have taken place, and not by mere evidence of circumstances which might afford a balance of probabilities against the fact that sexual intercourse did take place. In the present case, the husband and wife are proved to have been together, at a time when, if sexual intercourse did take place between them, the husband might, in the order of nature, have been the father of the plaintiff, and the circumstances given in evidence on the part of the defendant, not only do not afford irresistible presumption that sexual intercourse did not actually take place, but leave the balance of probabilities in favour of the fact that sexual intercourse did take place between them. It is true, that the rule laid down by the learned Judge who tried the issue, from the case of *The King v. Luffe*, cannot be reconciled with the opinions of all the Judges in the Banbury case, and is not therefore to be considered as the rule now applicable to the subject; yet, as it is my opinion that, if upon any direction from that

learned Judge the jury had found a different verdict, it would have been my duty to have ordered a new trial, it cannot serve either the purposes of justice, or the interest of the parties to submit this case a second time to a jury in order to give to the defendant the chance of their coming to a verdict, which, if they did find it, I could not adopt.(d)

In the same case, on appeal before Lord Chancellor Eldon, his Lordship said, "The case of the Banbury Peerage was decided in the House of Lords after very great consideration, and upon [ \*401 ] \*that occasion, some questions were put to the Judges. Now, it is well known, that the questions proposed to the Judges by the House of Lords, though made to approximate so nearly to the questions to be determined as to enable the House to form a judgment on the case actually before it, cannot be the very questions which the House is called upon to decide. The answers given by the Judges, therefore, although entitled to the greatest respect, as being their opinions communicated to the highest tribunal in the kingdom, are not to be considered as judicial decisions; but in that case of the Banbury Peerage, I take them to have laid down, so as to give it all the weight which will necessarily travel along with their opinion, although not a judicial decision, that where access, according to the laws of nature, by which they mean, as I understand them, sexual intercourse, has taken place between the husband and wife, the child must be taken to be the child of the married person, the husband, unless on the contrary it be proved that it cannot be the child of that person. Having stated that rule, they go on to apply themselves to the rule of law, where there is personal access as contradistinguished from sexual intercourse, and on that subject, I understand them to have said, that where there is personal access under such circumstances that there might be sexual intercourse, the law raises the presumption that there has been actually sexual intercourse, and that that presumption must stand till it is repelled satisfactorily by evidence that there was not such sexual intercourse. What is satisfactory evidence that there was not such sexual intercourse, is a question which may be put in two points of view: First, is it meant that it must be proved, from circumstances which took place at the time that that personal access which might or might not give an opportunity of sexual intercourse, was had, or by the evidence of persons present, that sexual intercourse did not take place? or secondly, that you are to go into all the evidence as to the conduct of the parties prior to the interview in which personal access was had, and their conduct after that interview, in order to satisfy yourself, by the evidence of circumstances both previous and subsequent to the interview, what did or did not pass when that interview was had. Whenever it is necessary to decide that question great care must be taken, regard being had to this, that the evidence is to be [ \*402 ] \*received under a law which respects and protects legitimacy, and does not admit any alteration of the *status et conditio* of any person, except upon the most clear and satisfactory evidence. It does not appear to me to be necessary now to ascertain what is the actual rule of law upon the subject; upon my recollection

of the Banbury Peerage case, it was the opinion of the Judges, that where personal access is established, sexual intercourse is to be presumed, and that that presumption must stand, till done away with by clear and satisfactory evidence, whether that evidence apply directly to the period at which personal access was proved, or whether it may be called satisfactory, if it apply not to that period, but to antecedent and subsequent periods, in one way or other the rule must be established.”(e)

Upon the trial of the second issue in the case of *Morris v. Davies, Vaughan B.*, without expressly referring to the Banbury case, stated the law upon this subject to the jury, in language so closely resembling the answers of the Judges in that case, that it is impossible not to conclude that he had them in his mind at the time, whilst there is a total absence of any intimation that he considered the law as he then stated it, to have been established by any recent decision at variance with older authorities. He told the jury, that “they must be satisfied that *no sexual* intercourse took place between the husband and wife, for if there was *any* such intercourse at a time, when by the course of nature, the husband *might* be the father of the child, the law fixes the child to be the child of the husband;” and further, “that if there was any *opportunity* for sexual intercourse, the law presumes it to have taken place as between the husband and the wife.”(f)

So on the trial of the third issue in the same case, Gaselee, J., said “the question to be determined was, whether the parties were in such a situation that sexual intercourse *might* have taken place between them; for if so, the law would presume that it did take place;” and his Lordship fully adopted the opinion of Mr. Baron Vaughan, as stated to the jury on the former occasion.(g)

\*In another case, Mr. Baron Alderson said, that where a jury believes that a husband and wife have actually had [ \*403 ] sexual intercourse within the requisite limits of time, the law will not allow a balance of the evidence as to who is most likely to have been the father.(h)

In none of these cases is there any intimation, that the learned Judges before whom they were tried, considered that the Banbury case had introduced any relaxation of the old strict rule which required the exclusion of all doubt that the husband could not be the father. And there is the positive authority of Lord Lyndhurst to the same effect.

When the case of *Morris v. Davies* was before Lord Lyndhurst, as Lord Chancellor, in 1829, he said, “There is no doubt or difficulty, as it appears to me, with respect to the law applicable to this question. It was stated distinctly and clearly by the Judges in the case of the Banbury Peerage; and I consider the opinion expressed upon that occasion, *not as laying down any new doctrine, but as arising out of and founded upon the previous decisions.*”(i) And when the case was before the House of Lords in 1837, his Lordship said, “He had stated on a former occasion, and he still entertained that opinion, that the learned Judges laid down *no new principle of law* in the Banbury

(e) *Head v. Head*, 1 Turn. & R. 139.

(g) 3 Car. & Pay. 427, (14 E. C. L. R.)

(i) 5 Cl. & Fin. 214.

(f) 3 Car. & Pay. 217, (14 E. C. L. R.)

(h) *Cope v. Cope*, 1 Moo. & Rob. 275.



**Peerage case.(g)** None of the cases on this subject, which have occurred subsequently to the Banbury Peerage, impugn the doctrine established by that case.

In *Morris v. Davies*, the law underwent very full consideration: three issues were tried; the case was then argued at length before Lord Lyndhurst, C. and again before the House of Lords whose decision confirmed the authority of the Banbury case. The facts of the case of *Morris v. Davies*, may be sufficiently collected from the judgments of Lord Lyndhurst and Lord Cottenham, whose observations form a valuable commentary upon the Banbury case, and the law thereby established.

[ \*404 ] \*Upon the 1st application for a new trial, in 1827, Lord Lyndhurst said, "A great deal was said with respect to the law applicable to questions of this kind. It appears to me, after all that has taken place upon the subject, that no doubt can be entertained with respect to the rule of law as applicable to cases of this nature. It is perfectly clear that when a husband and wife are not separated from each other by a sentence of divorce *a mensâ et thoro*, the law will presume access, that is, in other words, sexual intercourse, unless the contrary is proved, and it is also laid down, and very properly so, that in order to repel this presumption of law, the evidence must be clear and satisfactory; clear and satisfactory to the minds of those who are to decide upon the question; light presumptions will not be sufficient. The expressions of the Vice Chancellor, in the case of *Head v. Head*, are that the evidence must be clear and satisfactory. It is stated by the Judges in the case of the Banbury Peerage, that the facts and circumstances by which the presumption of law is to be repelled, must be such as to be satisfactory to the minds of the Jury who have to try the question. Therefore, evidence arising from circumstances may be sufficient to repel the presumption, provided the inference to be drawn from that evidence be clear and satisfactory. Another question arises, and was suggested in *Head v. Head*, namely, whether the inference, arising from the conduct of the parties, may be sufficient to rebut the presumption of law; undoubtedly, the evidence arising from the conduct of the parties may be most material and important; but whether such evidence alone would be sufficient to rebut the presumption, is unnecessary in this case to determine. In the case of the Banbury Peerage, the conduct of the parties and the evidence thence arising, formed a principal ground of the Judgment of the House of Lords." After applying the principles which he had thus stated to the facts of the case then before him, his Lordship continued: "It has been stated in argument, that this case resembled *Head v. Head*: it bears no resemblance to it whatever: it is true that the husband and wife were separated, and that there were occasional visits of the husband to the wife; these are the only circumstances in which that case has any resemblance to the present. There was not the slightest evidence to shew, in the case of *Head v. Head*, that [ \*405 ] the wife was living in adultery when the \*child was procreated; the birth of the child was not concealed, on the contrary, as soon as the child was born it was baptised in the name

of the husband; it went by the name of the husband during the lifetime of the husband. After the death of the husband, Randall, who was the supposed or reputed father, married the widow, and then for the first time the child was called by the name of Randall, and the only circumstance to repel the presumption, that the child was the child of the husband, was this change of names. Here, when the birth of the child took place it was concealed, and in the registry of baptism, the child is described as base born; he is baptised not in the name of the husband, but in that of Evan Williams, and afterwards, at school he goes by the name of Austin. That case, therefore, bears no resemblance whatever to the present."

Again, when giving judgment in the case, after the second and third trials, his Lordship, after recapitulating the facts, and stating that there was no doubt or difficulty, with respect to the law applicable to the question, and that he considered the opinion expressed by the Judges in the case of the Banbury Peerage, not as laying down any new doctrine, but as arising out of and founded upon the previous decisions, said: "On that occasion the Lord Chief Justice of the Common Pleas stated the unanimous opinion of the Judges in these precise terms. That in every case where a child is born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, sexual intercourse is presumed to have taken place between the husband and wife, until that presumption is encountered by such evidence as proves to the satisfaction of those who are to decide the question, that such sexual intercourse did not take place at any time, when by such intercourse the husband could, according to the laws of nature, be the father of such child. The question, therefore, is a question of fact, whether sexual intercourse took place in the spring of 1792, (for that is the period to which reference must be had,) between Mr. and Mrs. Morris. In the absence of all evidence, either on the one side or on the other, the law would presume that such sexual intercourse did take place. It was argued, at the bar, that the doctrine contained in the opinion which I have stated, has been \*affected by a case decided in this Court, the case of [ \*406 ] Head v. Head. In truth, however, Head v. Head does not in the slightest degree affect the opinion delivered by the Judges in the case of the Banbury Peerage. It recognises and adopts that opinion, and all that is said by the present Master of the Rolls, is, that the Court which is to be satisfied that sexual intercourse did not take place, must be so satisfied, not upon a mere balance of probabilities, but upon evidence which must be such as to exclude all doubt, that is, of course, all reasonable doubt in the minds of the court or jury, to whom the question is submitted. Therefore, in deciding this case, I look upon it that the point to which I am to direct my attention, as a question of fact, is this: whether the circumstances are such as to satisfy me, that no sexual intercourse did take place between these parties, at the period to which reference is had." After commenting upon some parts of the evidence, his Lordship proceeded. "Having noticed these two circumstances, I come back to the question of law. I have stated the opinion delivered by the Judges in the Banbury Peerage case, I will now refer to what was said on that occasion, by Lord Redesdale. That most learned, able, and acute lawyer, expresses

himself thus, 'I admit the law presumed the child of the wife of A., born when A. might have had sexual intercourse with her, or in due time after, to be the legitimate child of A., but this was merely considered as a ground of presumption, and might be met by opposing circumstances. The fact, indeed, that any child is the child of any man, is not capable of direct proof, and can only be the result of presumption: understanding by presumption, a probable circumstance drawn from facts, either certain or proved by credible testimony, by which may be determined the truth of a fact alleged, but of which there can be no direct proof.' He also says: 'It is, therefore, of high importance to consider in a question of legitimacy, whether the fact of such acknowledgment as would demonstrate the legitimacy did take place, or whether by circumstances, such acknowledgment was rendered impossible, as by the child being a posthumous child. If, on the contrary, it appears that the supposed father was ignorant of the birth of such a child, and that the fact of its birth was concealed from him, such concealment is strong presumptive proof that there had existed [ \*407 ] no sexual intercourse, which could have made him the father of such child.' Such was the opinion of the noble and learned person to whom I have referred. Lord Ellenborough's opinion, though delivered in more general terms, coincides with that given by Lord Redesdale: these were followed by the opinion of Lord Eldon to the same effect. Lord Erskine considered it necessary to prove the actual impossibility of sexual intercourse having taken place, but no lawyer will now contend that that opinion can be sustained. The case comes back, therefore, to the question of fact, (about the law there is no doubt,) are the circumstances of this case such as ought to satisfy the person who has to decide upon it, that sexual intercourse did not take place between Mr. and Mrs. Morris, in the spring of 1792." After referring to some of the principal facts in evidence, his Lordship then proceeded, "The concealment coupled with the other circumstances of the case, and the utter ignorance in which Mr. Morris was kept to his death, a period of seventeen years, with respect to the transaction, satisfies me as a conclusion of fact, that no sexual intercourse did take place between Mr. and Mrs. Morris, at such a period as could have rendered the child the offspring of Mr. Morris. In giving this judgment I affect no rule of law, I state the rule as I find it. It is founded on sound sense, and as I am bound to do, I acquiesce in it. I have come like a jury to a conclusion of fact. The circumstances of the case are such as to lead me to that conclusion, not, as I think, upon a bare balance of probabilities, but as the result of the thorough conviction of my mind, founded upon a careful and patient attention to all the evidence in the case. I am bound, therefore, having this impression, to state my opinion that the plaintiff is not entitled to the property in dispute as the son of Mr. Morris."

His Lordship's judgment having been appealed from, the appeal was heard before the House of Lords, in 1837, upon which occasion Lord Chancellor Cottenham, said, "The argument of the appellant is put thus: If sexual intercourse be proved, no evidence will be permitted to prove the child illegitimate, and proving the husband and wife to have been in situations in which sexual intercourse might have taken place, is proof of sexual intercourse. And as no distinct

proof of sexual intercourse is required or capable of being given, therefore no evidence can be \*received to prove the child illegitimate. This argument appears to me to rest entirely [ \*408 ] upon confounding two things which are perfectly distinct, viz.: the proof or conclusion of some intercourse having taken place, with the evidence by which such conclusion is to be established. If sexual intercourse be proved, that is, if the jury or the judge trying the question of fact be satisfied that sexual intercourse took place between the husband and wife at the time of the child being conceived, the law will not permit an inquiry whether the husband or some other man was more likely to be the father of the child; and some facts are so strong as to afford irresistible evidence of sexual intercourse having taken place, such as the husband and wife sleeping together, there being no natural impediment to sexual intercourse; but in the absence of such irresistible evidence, the fact of sexual intercourse must be tried like every other fact to which no direct evidence is applicable. Proof that the husband and wife were living in the same town, and so had opportunities of meeting and, therefore, of sexual intercourse, would, in the absence of any proof raising a presumption to the contrary, be sufficient to establish the legitimacy of a child born of the wife. Proof that they had been in the same room or in the same house together would be much stronger evidence of the fact, the strength of which, however, would vary with the circumstances; and as neither would be direct proof of sexual intercourse, but of facts from which, taken by themselves, sexual intercourse would be inferred, such inference must, as in all other cases, be capable of being repelled by the proof of facts tending to raise a contrary inference. The argument for the appellant assumes, as a rule of law, that no evidence is admissible to disprove sexual intercourse having taken place where the opportunity is proved to have existed, the husband and wife being proved to have been within the same house. This is very like attempting to establish a doctrine of *intra quatuor muros* instead of the exploded doctrine of *quatuor maria*. But it is admitted that the parties may be followed within these four walls, and the fact of sexual intercourse not only disproved by direct testimony, but by circumstantial evidence raising a strong presumption against the fact. If so, the principle does not stand on any positive rule of law, but upon evidence of the fact as to which the ordinary rules of evidence must be applied. Such \*would appear to be the obvious and common sense [ \*409 ] state of the question, as the law is now understood, and such appears to be the result of all the authorities since the Banbury Peerage case; for although some judges since that time have used expressions not quite reconcilable with the true principles of that case, and the opinions of the judges given upon it, I do not find that any judge has ever expressed any opinion that the law had not been correctly laid down in that case, or manifested any intention of acting on any principle inconsistent with the doctrine there propounded. Approving, as I do, of that doctrine, and feeling strongly the great evil that would arise from questioning rules so solemnly propounded and which have now for many years been considered as the established and acknowledged law upon the subject, I shall confine my

inquiries to the principles laid down in that case, and acted upon in subsequent cases."

His Lordship then recapitulated the facts of the Banbury case, and having commented upon them, and the conclusion which the house drew from them proceeded to make some observations upon the answers of the judges given in that case. "In terms the judges stated that by access they mean sexual intercourse, and not such intercourse as is understood by being in the same place or in the same house. Now, my Lords, all these answers assume that if sexual intercourse be proved at the proper time, the legitimacy of the child cannot be questioned, and that the fact of sexual intercourse may be tried like any other fact. They do not assume that opportunities of sexual intercourse are conclusive evidence that it did take place. My Lords, I consider the Banbury Peerage case, as establishing a principle not only from the opinions of the judges, but from the points actually decided distinctly negating the presumption argued for at the bar, namely, that where the evidence proves that the husband and wife had opportunities of access from being shown to have been in the same house or place, no evidence from the conduct of the parties, that is, no circumstantial evidence can be received to repel the presumption of sexual intercourse, and therefore the legitimacy of the child." His Lordship then proceeded to comment upon the cases which had [ \*410 ] occurred since the Banbury case; he cited \*Head v. Head, (h) The Gardner Peerage case, (i) Bury v. Philpott, (j) and Clarke v. Maynard; (k) and he stated, that he did not find any instance in which any judge had intended to lay down a rule different from that which is to be extracted from the Banbury Peerage case.

Lord Lyndhurst having premised that the arguments at the bar did not lead him in any degree to alter the opinion he had formed upon the subject when under his consideration in the Court of Chancery, and having referred to the fourth answer of the judges in the Banbury case, and the opinions of Lords Redesdale, Ellenborough, and Eldon, in support of the proposition contained in that answer, proceeded to observe that it had been suggested at the bar, but not stated with much confidence, that the opinion of the learned judges in the Banbury Peerage case, had been overruled by subsequent decisions, or at least, was at variance with the subsequent decisions; he had looked through the different cases which had been adverted to, and he found, looking at them minutely and attentively that not one of them in the slightest degree breaks in upon the principle so laid down; he agreed in that which was stated by Lord Cottenham, that particular expressions may be picked out from the opinions delivered by the judges on different occasions, which expressions taken without reference to the facts of the case to which they were intended to apply, may be made the foundation of plausible argument for the purpose of impeaching the authority of the decision in the Banbury case; but, he said, they do not go at all further than that which he had suggested, and it was remarkable, that in no one of the various cases to which reference

(h) *Supra*, p. 394. 399. 1 Sim. & St. 150; Turn. & Russ. 138.

(i) *Supra*, p. 394.

(j) 2 Myl. & K. 349.

(k) 6 Mad. 364.

had been made,—he referred to the subsequent decisions,—had the principle laid down by the learned judges in the Banbury case ever been called in question. That principle appeared to him to be this ; that the evidence of circumstances and of the conduct of the parties may be made so strong as to rebut and repel the presumption of sexual intercourse having taken place, which was an inference of law arising from the relation of husband and wife. That [ \*411 ] presumption, however, was not to be repelled upon light grounds. The evidence to repel it must be strong, distinct, satisfactory, and conclusive. The question was, whether the facts of the present case were sufficient to repel that presumption. He would observe, that all the facts which were allowed in the Banbury case to repel the presumption of law existed in this case, and with more distinctness and precision than in that case. In the Banbury case, the adultery of Lady Banbury was questioned ; in this case the adultery of Mrs. Morris was clearly proved : indeed, it was fully admitted by counsel at the bar, and could not in point of fact be denied. The great point was the concealment of the birth of the child. In the Banbury case, that was not distinctly proved as a matter of fact, but was collected only by argument and inference ; in this case it was distinctly proved and admitted by counsel at the bar in the course of the argument. There was a third point as to the acknowledgment of the child by the adulterer ; that was also contested in the Banbury case. Here it was proved by such an overwhelming abundance of evidence as rendered it impossible to doubt it. These three material and essential points on which the Banbury case turned, all existed in the present case, and were established by the clearest and most irresistible evidence. In the Banbury case, Lord Banbury took no notice of the existence of the child. The same point existed here to the same or even a greater extent. After adverting to the facts in evidence of this, his Lordship proceeded to observe that the child was baptised, named, brought up, and educated as the child of Austin, who made his will in the child's favour, passing over both his father and mother, who were poor persons, to whom, of course, his property would be of great importance. In the Banbury case there was no registry of baptism ; in this case, there was a baptismal register, in which the child was described as a bastard. In the Banbury case, the parties lived together ; there was no variance or hostility between them, but they were on kind and loving terms with each other. Here the parties lived separate for above twenty years. The conclusion which he had come to was this : Looking at all the evidence and giving it the best attention, it operated on his mind to produce the entire absolute conviction that the child, the \*appellant, was not the child of [ \*412 ] Mr. Morris, but the child of the paramour and adulterer Austin.

The house decided, that the legal presumption of legitimacy was in this case sufficiently rebutted by the evidence, and affirmed the decree of Lord Lyndhurst, thereby completely establishing the rules of law, as declared in the answers of the judges in the Banbury case.(f)

The only reported case which has occurred since the final decision in *Morris v. Davies*, is that of *Reg. v. Inhabitants of Mansfield*,<sup>(m)</sup> the facts of which have been stated in a former page,<sup>(n)</sup> and which is quite in accordance with the above decision.

The presumption of access has no place when the parents have been divorced *a mensâ et thoro*. In such a case the Court held that it was necessary to prove access, because they would intend a due obedience to the sentence, unless the contrary be shown.<sup>(o)</sup> But if the parties separate by a mere voluntary agreement, access is to be presumed until the presumption is rebutted in the ordinary way.<sup>(p)</sup>

Since the presumption of legitimacy, from birth in wedlock, proceeds upon the supposition that the existence of the contract would lead to conjugal intercourse, and therefore, supposes the *conception* to have taken place whilst the parties were married, the case of a child born so recently after marriage as to make it impossible that its procreation could have been postnuptial, is not referrible to this principle. Yet it has always been held, that the presumption of legitimacy applies when the child was born at any time, even a single day, after marriage.<sup>(q)</sup> Lord Ellenborough treated this case as standing upon its [ \*413 ] own peculiar \*ground. "The marriage of the parties," he said, "was the criterion adopted by the law in cases of ante-nuptial generation, for ascertaining the actual parentage of the child. For this purpose, it will not examine when the gestation began, looking only to the recognition of it by the husband in the subsequent act of marriage." And Le Blanc, J., said, that in the case of a man's marriage with a pregnant woman recently before the birth of the child, the very act of marriage in such a situation, is an acknowledgment by him that he is the father of the child with which the woman is pregnant.<sup>(r)</sup>

The presumption of legitimacy, arising from marriage, is not confined to the issue born during the continuance of that relation: but is extended, with equal force, to children born within such time after the death of the husband, as that by the usual course of gestation, they might have been begotten by him. This being a matter of uncertainty, there is no time fixed by the law at which the presumption shall cease. Lord Coke, indeed, lays it down that nine months or forty weeks is the latest time that the law allows for gestation:<sup>(s)</sup> but this position is too general, and is contrary to the authorities.<sup>(t)</sup> Forty weeks being, however, the usual period for a woman going with child,<sup>(u)</sup> in proportion as that period from the death of the husband

(m) 1 Gale & Davidson, 7.

(n) Supra, p. 395.

(o) *Parish of St. George v. St. Margaret*, 1 Salk. 123; 1 Bl. Com. 457. (p) Ibid.

(q) 1 Roll. Ab. 358; Smith Tract de Rep. Angl. lib. 3, c. 6; Swinb. Pt. 4, §. 15; Finch. L. 127; Co. Litt. 244, a.

(r) *Rex v. Luffe*, 8 East, 209, 212. Blackstone, it will be remembered, commends this part of the law as giving allowance to the frailties of human nature. For if a child be begotten while the parents are single, and they will endeavour to make an early reparation for the offence by marrying within a few months after, our law is so indulgent as not to bastardize the child, if it be born though not begotten in lawful wedlock; for this is an incident that can happen but once, since all future children will be begotten as well as born within the rules of honour and civil society. 1 Bl. Com. 455. (s) Co. Litt. 123, b.

(t) See Harg. Notes to Co. Litt. 123, b. n. 1, 2.

(u) See the authorities cited in Harg. Co. Litt. 123, b. n. 2, and the answers of Dr. Hunter, from which it seems that though the usual period of gestation is nine calendar months,

is exceeded, the presumption of legitimacy will be weakened, and a contrary presumption will arise.

Questions have occasionally arisen, when a widow having married soon after the death of her husband, has had a child within [ \*414 ] \*such time that it might, according to the laws of nature, be the child of either husband. In such cases it has been said that the child may choose its father, (v) but this doctrine has been questioned, (w) and in an early case, where the widow married immediately after the death of the husband, and forty weeks and eleven days after such death, had issue born, it was held to be the child of the second husband. (x) The better opinion seems to be, that the presumption of paternity, must be guided by the circumstances of the case, but it is conceived that evidence would be admissible, as in other cases of disputed legitimacy. (y)

There are but few authorities on the rebuttal of the presumption, by proof of impotency, and the evidence of the fact is of a kind which may justify an indisposition to examine it until the actual occurrence of the cases. The presumption of the husband's paternity from marriage, may be effectually repelled by evidence of such bodily defect or malformation as will satisfy those who are to decide the question, that it was physically impossible that he could have been the father of a child. (z)

## \*SECTION II.

[ \*415 ]

It is now necessary to inquire how those special qualities of consanguinity are to be proved which entitle the possessor to succeed, in preference to any others of the kindred of the *propositus*.

there is very commonly a difference of one, two, or three weeks. And see particularly The Gardner Peerage case, by La Marchant. (v) 1 Co. Lit. 8, a.

(w) Bro. Ab. Bastardy, pl. 18.

(x) Lord Hale's MS. Harg. Co. Lit. 123, b. n. 1.

(y) To prevent the inconvenience arising from this uncertainty of paternal parentage, the civil law ordained that no widow should marry *infra annum luctus*; a rule which obtained so early as the reign of Augustus if not of Romulus: and the same constitution was probably handed down to our early ancestors from the Romans, during their stay in this island; for we find it established under the Saxon and Danish governments. 1 Bl. Com. 457.

(z) Done and Egerton v. Hinton and Starkey, 1 Roll. Ab. 358, in which Lord Chancellor Ellesmere and Montague, C. J., held against Hobart, C. J., that if the husband be cast-rated the issue of the wife are illegitimate. So where the husband was of tender years, (1 Roll. Ab. 359,) which a case in the year-books (M. 1 Hen. 6) would establish to mean under the age of fourteen. There appears, however, to be no legal presumption of impotency from old age. For although Swinburne, *Espousals*, p. 50, says, that the possibility of issue must not be applied to a case where the husband is eighty, he is corrected by his annotator, who observes, that against this general doctrine all Englishmen of eighty formally protest. And Lord Eldon cites the observation approvingly in the Banbury case, and held that there was no presumption against the legitimacy of the claimant's ancestor from the Earl of Banbury being eighty years old. And Sir S. Romilly cited several instances of men above that age becoming parents. And see the various authorities upon general impotency cited in North v. Seaton, 3 Phillim. 147. On *impotentia versùs hanc*, Webber v. Bury, 5 Rep. 99; 1 And. 185, cited ante. Stafford v. Mongy, Dyer, 179. Case of the Countess of Essex, in State Trials. Information sufficient to satisfy the most curious upon this subject will be found in Zacchias *Questiones Medico-legales*, lib. 3, tit. 1, who there treats at large, 1. *De causis impotentia*. 2. *De impotentia ex defectu ætatis*. 3. *De impotentia ex defectu naturalis*. 4. *De impotentia ex morbis*. 5. *De frigida et maleficia*. 6. *De impotentia respectiva dicta*. 7. *De sterilitate fœminarum et de imperforata*.



Where the title asserted is simply that of heir or next of kin, these required qualities are indicated by the law governing the succession; and where the title is that of an object of a gift or limitation, they are to be sought for in the instrument expressing the grantor's or testator's intentions. In either case, it will be found that any special qualities of consanguinity essential to a claimant's title, are comprised within three species of facts:—degree of relationship, sex, and order of birth. In personal succession *ab intestato*, and in limitation to a certain class of relatives simply, the first alone is regarded. All three are ingredients in the constitution of the title of heirs at common law, or in borough English, and of persons claiming under limitations, such as that usual in settlements to the first and other sons successively. Heirs in gavelkind, or in tail female, and objects of limitations such as to sons or daughters in common, take irrespectively of the order of birth, but not of sex or degree of kindred. Other variations occur according to the expressed intentions of grantors or testators, or the customs of manors. The former may also impose further limitations in the class who are to take, as by gifts to relatives of a particular name, but these are not properly special qualities of consanguinity, but qualities which must exist in addition to consanguinity. The facts of marriage and filiation are only instrumental in establishing a general consanguinity. The evidence of the claimant's relationship in the alleged degree, is only the evidence of the several filiations which form links in the chain of consanguinity. Whether it is universally necessary \*to allege and prove some specific degree of kindred [ \*416 ] to the *propositus*, and in what cases evidence of an undefined consanguinity will prevail, are questions of considerable interest and importance. They called for examination in the following case: (q) T. J. Selby, by his will, (r) dated in 1768, devised the bulk of his real and personal estate to his right and lawful heir at law; for the better finding out of whom, he directed advertisements to be published in some of the public papers immediately after his decease; but should no heir at law be found, then the estates were devised to other persons. For one of these estates, Thorne, the lessor of the plaintiff, brought ejectment; and on the trial before De Grey, C. J., gave some slight evidence of a reputed relationship between himself and the testator, and of acknowledgments that the Thornes were his heirs at law, but made no deduction of pedigree, nor was able to state how the relationship arose, or who was the common ancestor, or whether any ancestor of Thorne was brother or sister of any ancestor of Selby.

The jury having found for the plaintiff, a new trial was moved for, both on the imperfection of the evidence, and upon the alleged principle, that in order to recover as heir, it was necessary to state some pedigree, and to show how the heirship arose; otherwise, it was contended, if a mere apprehension of the deceased that A. was his relation, or was his heir, be sufficient, it might carry the estate contrary to the rules of descent to the half blood, to the maternal instead of to the paternal line, &c., and would introduce much confusion and perjury. On shewing cause for the lessor of the plaintiff, a case was

(q) *Roe dem. Thorne v. Lord*, 2 W. Bl. 1099.

(r) See the will at length, *Hone v. Medcrafts*, 1 Bro. C. C. 261.

cited, *Newton v. The Corporation of Leicester and the Attorney-General*, about eight years before, when there was no deduction of pedigree, but the lessor of the plaintiff obtained a verdict, because it was proved that the deceased used to call him cousin. And another between *Newton v. Newton at Derby*, where no common ancestor was shewn, but it was proved that the deceased and the claimant were descended from two brothers, which Parker, C. B., held sufficient. The Court took time to consider, but was not able to agree \*in opinion concerning the necessity that a person [ \*417 ] claiming to be heir, shall state in evidence a pedigree, either proving the deceased and the claimant to be descended from some common ancestor, or at least from two brothers or sisters, (which was allowed to be an immediate descent) or whether vague evidence of heirship without such deduction is proper to be left to a jury; and the whole Court being clear that the evidence now given was too loose and insufficient to prove even general kindred to the testator, the rule was made absolute for a new trial.

The reporter, Sir W. Blackstone, says, that the judges who thought the deduction of descent was necessary, held (in their private conference) that the same which ought to be *pleaded* in real actions, must be given in evidence in ejectment, in order to make out a title by descent, and they relied on the authorities cited below.(s)

These establish that in real actions, whether a party sued as heir, or sought to charge another in that character, it was necessary to set forth the manner of the heirship.(t) If one claimed as cousin and heir, he was to shew "*coment cousin*."(u) And still in the ecclesiastical courts, in disputed proximity of kindred, it is necessary (except in one case, which will presently be mentioned,) to set forth in the allegation all the steps of descent from the common ancestor by which the consanguinity is said to exist.(v)

There are many reasons why the practice should apply to evidence in ejectment. The plaintiff must recover by the strength of his own and not by the weakness of the defendant's title;(w) the general consanguinity shewn may be by the opposite line to that \*in [ \*418 ] which the heirship is to be sought; and if the steps of descent appeared, the defendant might prove this, or that there was a nearer heir, or an obstruction to the inheritable blood, as bastardy, alienage, or attainder in some ancestor counted.(x) It is not a sufficient answer to say that the defendant may himself prove a person to be the plaintiff's ancestor, and show such obstruction in him; because this merely bars one avenue of consanguinity, and *non constat* that the general consanguinity shewn was not by another.

In equity, if any derivative title to sue is alleged, it is necessary to

(s) Bro. Mortancestor, 13, 2. West's Symbologr. 65; Co. Entr. 596, 597; Thelwall, 207, n<sup>o</sup> 11. Colvill v. Huddleston, Dyer, 79 a; Fitz. Wasto, 51; Dyer, 89 b; Dyer, 376; Plowden, 425; Dyer, 319 a; S. C. Entr. 196 a. See also *Heard v. Baskerville*, Hobb. 232. *Jenk's case*, Cro. Car. 151. *Edwards v. Rogers*, 1 Jon. 456. *Duke of Newcastle v. Wright*, 1 Lev. 190. *Kellow v. Rowden*, 1 Show. 244; Carth. 126. *Denham v. Stevenson*, SalK. 355; 6 Mod. 241. *Reynoldson v. Blake*, 1 Lord Raym. 202.

(t) See also *Stephen Pl. c. 2, a. 4, r. 5*.

(u) *Colvill v. Huddleston*, Dyer, 79 a; 2 Saund. 45 a; Moor, 885.

(v) *Rutherford v. Maule*, 4 Hag. 238.

(w) 4 Burr. 2487.

(x) See per Warburton, J. Hob. 233.

state the manner of the derivation; and accordingly, if the title asserted is that of heir, the manner of the heirship ought to be properly set forth.(y) The rule was not applied with much strictness by Lord Thurlow, when, in effect, he held that a plaintiff claiming as heir, and deducing her descent from a younger son, had impliedly alleged the failure of issue of an elder son.(z) But in a recent case, the Vice Chancellor held, that in pleading a title by descent the rule of court is to follow the rule of pleading at law. "The defendant," he said, "was entitled to be apprized of all the links which constitute the chain of descent; and a bill, alleging that A. B., cousin of the plaintiffs, died without issue and intestate, leaving the plaintiffs his co-heirs at law, was held to be demurable for want of sufficient particularity in the statement of the title by descent.(a)

Where a bill was filed by the next of kin of a testator against the executor, charging him as a trustee for them of the residue, and the defendant, by his answer, denied that they were next of kin, and put them to the proof of their relationship, Lord Thurlow, upon the report of the Master, finding the plaintiffs next of kin, charged the defendant with the costs of establishing their title.(b) It does not appear from the report of this case, whether the bill stated the manner in which the plaintiffs traced their relationship; but it seems that the courts of [ \*419 ] equity follow the \*rule of the ecclesiastical courts in requiring the precise degree of consanguinity to be established in claims as next of kin.(c)

As against the crown, however, a general relationship will suffice, at least in a party claiming as next of kin. In that case it has been held in the Ecclesiastical Court that the particular steps of kindred need not be alleged, since the most distant degree is sufficient to defeat the crown's title.(d)

Perhaps it may not follow that an undefined consanguinity will bar an escheat of lands, though there may be some reason to contend for this proposition in the cases of descents since the Inheritance Act. In those cases which occurred before, kinsmen of the person last seised might be in existence, and yet incapable of inheriting by reason of their consanguinity being through the half blood, or on the side opposite to that from which the lands descended. But in descents since the statute, the former impediment being removed, and a rule of evidence being applied by which the person last entitled is presumed to be the purchaser, and constituted the *propositus*, all his kindred, maternal as well as paternal, must succeed before the crown. It seems impossible to imagine a case in which the existence of a party who is related by blood to *him* will not bar the escheat. But if the crown is in possession, the question may be the same as in ejectment.

It will be collected from what has been said in a former chapter, that in claims to titles of dignity, the most accurate statement is required of the degree of kindred alleged to exist between the claimant and the *propositus*.(e) And indeed, it seems to have been thought at

(y) Lord Digby v. Meech, Bunb. 195; and see *ibid.* 115. 129.

(z) Delorne v. Hollingsworth, 1 Cox, 421; *ante*, p. 200.

(a) Baker v. Harwood, 7 Sim. 373.

(b) Lowson v. Copeland, 2 Brown, C. C. 155.

(c) Gregg v. Taylor, 5 Russ. 19.

(d) Stole v. The King's Proctor, 2 Ca. temp. Lee, 394.

(e) Sup. Pt. 1, Ch. 5.

one time, that where a claim was made to a co-heirship in a dignity, the claimant was bound to deduce the pedigrees of all the co-heirs as well as his own. This however, is now settled not to be requisite, and it is sufficient that notice of the claim be given to those claiming to be co-heirs.(f) But it must \*be shewn that the notice [ \*420 ] has been received, and it is not sufficient to state that it was sent in a letter by the general post.(g)

There is a peculiar species of claim founded on consanguinity in which it appears to be unnecessary to prove any specific degree of consanguinity. The claim referred to is that of founder's kinsmen, as they are termed, asserting as such, a right to priority of admission to fellowships, and other privileges in some of our collegiate establishments.(h) The founders who reserved such benefits to their kindred, did not direct any preference to be shewn to proximity of blood, and evidence of general consanguinity will therefore be sufficient to shew a title in the claimant; and proof of descent from an ancestor who has formerly enjoyed the privilege of founder's kin, is allowed as satisfactory evidence that the descendant is of the privileged blood, although he may not be able to prove the descent of such ancestor.

A question has been raised in respect to these claims, whether collateral consanguinity can, for the purpose of conferring such privileges, be considered as existing in *perpetuum*. A claim to be admitted to a fellowship at All Souls' College as founder's kin having given rise to much discussion, Sir William Blackstone, in a learned tract on the subject, contended at some length for the negative of this question.(i) His principal argument is this, that the founder certainly intended to confer a peculiar benefit upon his *consanguinei*, by giving them a preference in admissions to fellowships; that as he, being a priest, could have no lineal descendants, by the term *consanguinei* he must have meant collateral kinsmen; that he has given no preference to proximity of blood, and therefore unless the meaning of the word *consanguinei* be limited, all his collateral kinsmen, however distant, or in other words all the world, would be entitled to claim the benefit, and that the universality of the claim would render the benefit nugatory. \*The learned writer contends therefore, that the [ \*421 ] word *consanguinei* must have been used in a limited sense, and probably that sense in which it was explained by the canonists and civilians, who for the purposes of succession, &c., confined the application of it to collaterals within the tenth degree; and that *consanguinitas* to the founder within that degree must have long since ceased to exist. He supports this opinion by many learned quotations from the old writers, shewing the meaning of the word *consanguinitas* as used by them; and presses strongly the inconvenience which, he argues, would follow from a different interpretation. It was, however, decided by competent authorities, both on that occasion, and on a

(f) Vaux Barony, 5 Cl. & Fin. 535. Camoys Barony, 6 Cl. & Fin. 794.

(g) Camoys Peerage, ubi sup.

(h) The principal instances of these privileges are to be found in Winchester College and New College, in Oxford, founded by William of Wykeham, and in All Souls' College in the same University, founded by Archbishop Chichele. In St John's College, Oxford, six out of fifty fellowships are reserved for the descendants of the two sisters of Sir Thomas White, the founder.

(i) Bl. Essay on Collateral Consanguinity, Law Tracts.

more recent one, that the consanguinity to the founder and its consequent privileges, are not to be considered extinct.(j)

In the year 1829, an appeal was brought, on the above ground, against the admission of two boys as scholars into Winchester College, and two others as fellows into New College, as founder's kin. The appeal was made to the Bishop of Winchester, the Visiter of Winchester and New Colleges, who heard the cause in person, having for his assessors, Mr. Justice Patteson, and Dr. Lushington then the Chancellor of the Consistory Court of London. The question was argued by Sir H. Jenner, King's Advocate and Mr. Erle, for the appellant, and by Dr. Phillimore and Mr. Lefevre, for the respondent. The arguments for the appellant were principally the same as those advanced by Sir W. Blackstone, in his treatise on Collateral Consanguinity; and, after a very full discussion, the bishop, with the advice of his assessors, dismissed the appeal.(k)

It may be contended, in justification of those who support the non-extinction of the consanguinity, that assuming the position of Sir W. Blackstone to be correct, that the founder used the terms [ \*422 ] *\*consanguinei* and *consanguinitus* in the limited sense, it will follow that the number of persons for whom the privilege was intended, was also limited—limited in fact, to the number of collateral kinsmen then in existence within the required degree; but much more limited for all practical purposes by the necessity of proving the proper consanguinity. The number who could bring themselves within this last limit was probably very small. What ground is there for contending that each of these might not have been intended by the founder to form a stipes, whose lineal branches should inherit the same privileges? Sir W. Blackstone seems to admit, that if the question had been as to lineal descendants of the founder instead of collateral kinsmen, the arguments against the extinction of consanguinity would have had considerable weight: and it is submitted, that in the view which is now suggested the two cases approximate very closely, the principal difference being in the number of favoured stipes.

With respect to the general doctrine of placing a limit at which consanguinity should be considered to cease, it must be borne in mind that our law of descent is unacquainted with any limit to kindred. Having laid down rules whereby the heir is marked out, it casts the inheritance upon him, in however remote a degree whether of lineal or collateral consanguinity, he is of kin to the ancestor.(l) In this particular the common law of England certainly differs from all those ancient laws which are thought to have contributed to its formation. Boundaries were established in the Saxon, Norman, feudal, and perhaps the civil laws beyond which collateral kindred was not comput-

(j) By an injunction of Archbishop Cornwallis made in 1777, and confirmed by Archbishop Moore in 1792, the number of fellowships in All Souls' College appropriated to the founder's kinsmen is restricted to ten. It should be observed, that by the statutes of the college, the Archbishop of Canterbury is constituted co-founder and visiter, and as such may have power to alter the statutes. See this injunction given at length at p. 35 of Dr. Phillimore's Report of the Winchester and New College case, cited *infra*.

(k) See Dr. Phillimore's Report of an appeal against the election to the vacant scholarships at Winchester and New College in 1829, published in 1839.

(l) It has been suggested that it might be advantageous to disallow a title by descent in ordinary cases beyond a certain degree of remoteness. First Real Prop. Rep. 492.

ed. These laws however, though agreeing in the general institution, differ as to the point where the limit should be fixed. Thus we find that the fifth degree(*m*) was the limit in some codes, whilst others admitted the seventh.(*n*) And the civil law, if it imposed any absolute limit, fixed it at the tenth degree.(*o*) It is however by no means clear that there was any limit in the civil law; for the \*words that the heirs shall succeed "*etsi decimo gradu sint*," upon [ \*423 ] which the notion of a limit is founded, do not necessarily imply that none beyond the tenth degree shall succeed.(*p*) Admitting that the institution of a certain terminus to kindred runs through all these ancient laws, a cause of it is easily discernible in the want of genealogical evidence. For beneficial purposes it was reasonable to hold relationship expunged when it could no longer be satisfactorily ascertained; and the remoteness of the point at which this might take place would depend upon the evidence within reach, its abundance, and efficacy. The difficulty of proving descents was, according to Sir Martin Wright, the cause of the relaxation of the old practice which required the claimant of a feud to deduce his title by descent from the first feudatory.(*q*) Sir Wm. Blackstone agrees in this opinion, and points to the true cause of the want of evidence when he speaks of "the rude and unlettered ages" in which the difficulty was experienced.(*r*) The law however, whilst adopting the maxim *seisina facit stipitem*, still retained the presumption that the person last seised was of the blood of the first ancestor, and upon that presumption excluded the half blood from the succession; and an exception to the last mentioned rule in successions to the crown, and crown lands, shews how the law of descent was influenced by the difficulty of tracing it; for in successions of the latter kind the half blood was no impediment, because, as Sir W. Blackstone writes, "the royal pedigree being always a matter of sufficient notoriety, there is no occasion to call in the aid of the presumptive rule of evidence to render probable the descent from the royal stock."(*s*)

At the early period at which the laws of descent were established, the personal knowledge and memory of witnesses was almost the only means of preserving evidence of pedigree; and many passages might be cited which show the reference which was always had to this state of things. Thus by a decree of the council of Worms in 868, marriages amongst relations were \*forbidden "*usque dem generatio recordatur, cognoscitur, aut memoriâ retinetur*."(*t*) Afterwards, by a canon of 1065, the prohibition was limited to the seventh degree because, amongst other reasons, beyond that, "*non potest memoriter ab aliquo generatio recordari*."(*u*) In proceedings upon the writ *de natio habendo*, brought by the lord to recover

(*m*) Wilkins, L. C. Anglo-Sax, 266. This degree was also limited among some of the German nations. Lindenb. Cod. L. L. Ant. 460. And see Hale's Hist. Com. Law by Runnington, p. 309.

(*n*) Grand Coutumier of Normandy, ch. 25, de escheance.

(*o*) Inst. iii. 5, 5.

(*p*) Blackstone has collected many glosses upon these words, which however do not seem to establish the point for which he contends. See Essay on Coll. Consanguinity, p. 31.

(*q*) Wright's Ten. 184, 185, 186.

(*r*) Treatise on Descents, 1 Bl. Law Tracts, 214.

(*s*) Ibid. 222.

(*t*) Decretum, pars 2, caus. 55, qu. 2 & 3 c. 18; and see this title, passim.

(*u*) Ibid. qu. 5, c. 2.

possession of one whom he claimed as his villein, he was obliged to prove the villenage by the evidence of the kinsmen of the villein.(v) Again we find that when a person claimed to do homage as heir, *if he was not known to be heir by the lord himself, nor by the vicinage*, the lord might hold the land himself till it was made clear to him.(w) So in the assize of mort-ancestry, the proof of heirship seems to have rested solely in the personal knowledge of the jury.(x)

If then we are right in considering the defective nature of genealogical evidence as one principal cause which led to the adoption of a limit in consanguinity, it seems to follow that there is nothing inconsistent in withdrawing that limit when more effectual means of procuring such evidence are generally attainable. And as it is clear that our law at the present day knows no limit in kindred, beyond which succession to real or personal property shall not take place, so by analogy it will follow that no degree of remoteness can deprive the blood of any quality or privilege for other purposes.

It has been stated that sex forms one of the special qualities of consanguinity by which priority in succession is determined. Where a claim is made through a female as heir at common law, evidence will be required to shew that she was the only child, as a son, whether older or younger, would take precedence, and a daughter, whether older or younger, would be entitled to an equal share. This preference of sex however, only applies to real property; in the distribution of personal property the law recognizes no distinction between male and female. So also where there is a limitation to a class of relatives simply, the sex of the individuals included in that class is immaterial.

[ \*425 ] \*But even in those cases in which the sex of a party has to be considered, it can seldom be the subject of separate evidence, for it is obvious that proof of the existence of an individual will most commonly contain within itself proof of the sex of that individual. Yet though the name will in general be a strong indication of the sex, it cannot always be relied on: as instances are not unfrequent of caprice, accident, or some other cause having led to the bestowal upon children of names not usually applied to their sex.(y)

Appellations also frequently occur which custom has not dedicated to either sex: and in consequence of the now common use of surnames as Christian names, the cases are more frequent in which this most usual indication of sex fails.

The third and only remaining species of fact from which must be derived any special quality of consanguinity essential to a claimant's title, is order of birth. Where a claim is made through a son as heir at common law to his father, the evidence required is not only that he is the legitimate son, but the oldest or only son of his parent.

(v) Glanville, lib. 5, c. 4.

(w) Glanville, lib. 9, c. 6.

(x) Bract. 273. See also *ibid.* 216 a, 281, 373.

(y) Thus a son of the first Earl Powlett was called Anne Powlett, born 1711, died 1785, Queen Anne having been his godmother. Other examples of names usually appropriated to females having been borne by males, have occurred in the families of the Earl of Scarborough, Lord Strangford, Lord Raneliffe, and the Marquis of Downshire. Some names also are borne indiscriminately by both sexes, as Evelyn, Sabine, Christian, &c. In the register of Hanwell, in Middlesex, is the following entry. "Thomas, daughter of Thomas Messenger, and Elizabeth his wife, was born and baptized Oct. 24, 1731, by the midwife at the font, called a boy, and named by the godfather *Thomas, but proved a girl*."—Burn's History of Par. Reg. p. 81, note.

The evidence by which general consanguinity, as well as the special qualities of it constituting priority, may be established, is of the same nature, and to be derived from the same sources, as proofs of the several matters of pedigree discussed in the foregoing chapters. Thus in the absence of direct testimony of witnesses, recourse is had in the first instance to parochial registers as the most legitimate mode of proving the facts recorded in them. The successive filiations in which consanguinity consists, and the sex of each individual, may be satisfactorily proved \*by means of parochial registers of [ \*426 ] baptism : but such registers, except in certain cases to be mentioned hereafter, are not of themselves evidence of the time, nor consequently of the order of birth. But in conjunction with other facts, they may afford strong presumptions. Thus if the period between the marriage of the parents, and the baptism of the child, do not much exceed the ordinary period of gestation, there is a strong presumption that such child was the first issue of the marriage. This is not conclusive however, as there may have been twins, or a child born, though not procreated, in wedlock. In an old case, the Court of Chancery, upon view of the body, and upon open examination of several witnesses, and upon view of the church book, adjudged the defendant to be under the age of twenty-one years.(z) And in a more recent case, a register of baptism, accompanied by proof that the party was born about the time, was admitted as evidence of infancy.(a)

Inquisitions *post mortem* afford good evidence of the time of birth, as well as of the other matters of pedigree found in them. Upon the trial of an issue as to the age of a person at the time of her suffering a common recovery, an inquisition *post mortem*, in which she was found heir to her father, and of a certain age at that period, was received in evidence of her age at that time.(b) So in the Vaux peerage case, two inquisitions *post mortem* were admitted as evidence of the relative ages of two ladies through whom the petitioners claimed.(c)

The declarations of relations, whether oral or written, may be received to prove consanguinity generally, or in any particular degree. Thus in the case of *Thorne v. Lord*(d) already cited, no question was raised as to the admissibility in evidence of the reputation and acknowledgment of relationship, although it was not considered sufficient to warrant a verdict for the plaintiff.

But expressions which undeniably admit some degree [ \*427 ] of \*relationship, may yet be considered insufficient to prove the particular degree insisted on. The word "cousin" is one of this nature.

In a case where it was partly relied on to prove the plaintiff's claim as second cousin,(e) Sir J. Leach, M. R., after rejecting the evidence of one witness on the ground of interest, said, "There remains no testimony by which the precise degree of consanguinity between the claimant and the testator can be ascertained, unless it be assumed

(z) Toth. 135, cites 28 Eliz. Wood v. Wagsman.

(a) Leader v. Barry, 1 Esp. N. P. C. 353.

(c) 5 Cl. & Fin. 540, infra, p. 430.

(e) Gregg v. Taylor, 5 Russ. 19.

(b) Darcy v. Leigh, Hob. 324.

(d) 2 W. Bl. 1099, sup. p. 415.



that where the will of the testator's father speaks of his cousins Richard Osgoode and William Osgoode, it must be intended that he means to describe them as first cousins. I can find nothing in the context of the will to afford that inference, and the term cousin, in common and popular language, is of too extensive a signification to be so limited without any explanatory context."(*f*)

In the construction of a will, the Lord Chancellor Cottenham held that the words "all my first cousins or cousins german," meant first cousins in the first degree only. (*g*)

It has been doubted whether the time of birth is a matter of pedigree within the rule admitting of hearsay evidence; but the case of *Kidney v. Cockburn* (*h*) may be considered as having settled the question in the affirmative. In that case, the question arose upon the title of the plaintiff claiming as heir at law of a lady of the name of Christian Kidney who died in 1826; and in order to make out his title in that character, it became necessary for the plaintiff to shew that John Kidney the plaintiff's grandfather, and David Kidney the grandfather of Christian Kidney, who were admitted to have been the sons of one Jonathan Kidney of Market Harborough, were born of the same mother. By an order of Sir L. Shadwell, V. C., affirmed by Lord Brougham, C., on appeal, the parties were directed to proceed to a trial in the Court of Common Pleas, upon the following issue: Whether \*John Kidney, and David Kidney, children of Jonathan Kidney, were brothers of the whole blood? Upon the trial it was established, that Jonathan had been twice married, that his first wife died in March, 1693, and his second wife in November, 1703, and for the purpose of shewing that his sons David and John must have both been children of the first marriage, there were tendered in evidence, first, as to David, (whose burial appeared from the parish register to have taken place on the 23rd of December, 1750,) certain inscriptions, one on an old tombstone in the cemetery, the other on a monumental tablet in the church of Market Harborough, wherein David was stated to have died on the 16th of December, 1750, at the age of sixty-four years. There were then tendered, as to John, (who, according to the entry in the parish register, was buried on the 9th of February, 1760,) various declarations, made by a deceased grandson, many years ago, and sent by post to his brother, the plaintiff, stating that John, their grandfather, was seventy years of age when he died. The issue was tried before Chief Justice Tindal, who refused to receive the inscriptions, declarations, and letter, on the ground, that although admissible for the purpose of shewing the relationship, they were not admissible as evidence to prove the ages of the several parties referred to therein; these being facts which the learned judge was of opinion could not be proved by hearsay. The jury found for the defendant, and his lordship, as appeared from his note, was satisfied with the verdict, provided he was right in rejecting the evidence above stated; but the note added, that if such evidence of the age at which the two children of Jonathan died, ought to have been admitted, and was believed by the jury, there would then be

(*f*) It seems that in Devonshire the word "cousin" is still used as in our older writers to signify nephew. See *Ford v. Pezzing*, 1 Ves. 73.

(*g*) *Sanderson v. Bailey*, 4 My. & C. 56.

(*h*) 2 R. & M. 167.

no doubt that John Kidney and David Kidney were brothers of the whole blood. A new trial was moved for, on the ground that this evidence had been improperly rejected, and the Lord Chancellor Brougham, after taking time to consider, and consulting with Mr. Parke, and Mr. Justice Littledale, expressed a strong opinion in favour of the admissibility of the evidence. A case was prepared for the King's Bench, but the cause being afterwards compromised, no further proceedings were had.

In an old case at nisi prius, where there were conflicting statements, \*as to the order of birth of two children, [ \*429 ] the declarations of a member of the family as to circumstantial facts on which her knowledge was founded, appear to have been received.(i)

General reputation in the family, as well as express declaration, may be used to prove the relationship in question. In the Dunsany case, that the claimant was the eldest son of the late Lord, was proved by the depositions of a lady who was a relation of the family; and the Dowager Lady Dunsany, who was his step-mother, proved that he was always treated and spoken of by his father as his eldest son and heir to the title, and was so considered by all the members of the family;(j) and upon this evidence the claim was allowed.

The conduct of the alleged parent or relation towards the claimant, has long been considered of importance in questions of this nature. In the 18 Ed. 1, a verdict, finding the daughter of a son heir to her grandfather, was impeached by a sister of the son. But the verdict was held right in Parliament, "*quia publicum et notorium fuit quod idem W (the son) tempore suo prædictam Dionysiam ut filiam et hæredem suam tenuit, et hoc idem dum vixit in pluribus locis sciri et proclamari facit.*"(k)

But recognition by the alleged father is not always conclusive of the fact, and may be rebutted by other evidence, as shewing that the recognition was procured by fraud.(l)

In the case of Annesley v. Earl of Anglesea, the conduct and declarations of the Earl of Anglesea were relied on by the plaintiff's counsel, and appear to have had considerable weight with the Court, as shewing a consciousness on the part of the Earl that the plaintiff was his nephew.(m)

The order in which the names of brothers and sisters occur in the will of a relation, has been considered strong presumptive \*evidence of the order of their respective births. In the [ \*430 ] Vaux Peerage case, in order to shew that Mary Vaux, the ancestress of one of the claimants, was the elder of two daughters, the will of their grandmother, Lady Mary Vaux, was put in, and this extract read:—"I bequeath to Mary Vaux, the daughter of my son George Vaux, 300*l.*, and to Wm. Vaux, her brother, 200*l.*, and to Henry Vaux, Joyce Vaux, and Catherine Vaux, 100*l.* a-piece." In confirmation of the inference drawn from the will, two inquisitions *post mortem* were produced, which shewed that Catherine was only twelve years old when Mary was married. It was contended, on the part of another

(i) 12 Vin. Abr. Ev. T. b. 91.

(j) Palmer's Parl. Solicitor's Assistant, 68.

(k) 1 Rot. Parl. 306.

(l) Ex parte Wallop, 4 B. C. C. 90, cited in Kemble v. Abbott, 4 Ves. 392.

(m) How. St. Tr. Vol. 17, 1139, 1415.

claimant, that the fact of a larger legacy being given to Mary than to the other children, would sufficiently account for her name being first mentioned, especially as she was the namesake, and probably the god-child of the testatrix; and it was stated that she was mentioned last of the three sisters in a pedigree printed by Sir W. Dugdale, obtained by him from Edward Lord Vaux. The Attorney-General expressed a doubt as to the priority of birth of Mary and Catherine, but the Lord Chancellor (Cottenham) said he considered the matter satisfactorily explained, and that Mary was properly placed in the pedigree before Catherine; and so the Committee of Privileges gave their opinion.(n)

So in the Camoys Peerage case, the order in which two daughters were mentioned in the will of their father, was assumed, and not denied, to be satisfactory evidence of their respective seniorities.(o)

The acts of parties themselves will afford presumptions of their age, where a particular age is necessary to the validity of such acts, especially where the assent of other parties is necessary, whose duty or interest it is to be satisfied of the regularity of the proceeding. Thus, the date of a peer taking his seat in the House of Lords, would be strong presumptive evidence to fix the period of his birth. So from the marriage of a person by license, without the consent of parents or guardians, subsequent to Lord Hardwicke's Act, the inference would

[ \*431 ] arise that such person was of full age at the time of the marriage; and the inference would be strengthened if the act of the party was in any way against his own interest, as the bringing actions as a person of full age, which was an admission that would preclude him from pleading his infancy to any action brought against himself, whereas a proof of full age by jurors was not conclusive, because the jurors might swear falsely *prece vel precio corrupti*.

Presumptions of this nature will have greater weight when they arise in the case of remote pedigrees; as, before the abolition of military tenures, the condition of minors made the attainment of majority an era of much importance. The law, therefore, made anxious provision for the means of proving the age of the party.

If a defendant pleaded minority, the question was to be tried by the oaths of eight free and lawful men.(p) If an heir brought a writ of right or assize of mort ancestry, and it was pleaded against him that he was a minor, he might reply that he had proved himself of full age *per inquisitionem et per patriam*. If he had such an appearance that it might be vehemently presumed that he was of full age, "*ut si fuerit barbatus, staturâ magnus, vel hujusmodi*," and the justices should so determine, he should be taken to be of age against all persons, and the judgment was not to be called in question. If the justices hesitated to pronounce an opinion, recourse was had to the "*probationem patriæ et parentum*;" this was by the verdict of twelve men, or more, if necessary, some of whom were to be of his family, and some strangers.(q)

Another occasion should be noticed for which the law provided the method of proving age. This was where the heir of a tenant in *capite* being in ward to the king, sued out his writ *de ætate probandâ*, that

(n) 5 Cl. & Fin. 540, 594, 610.

(p) Glanville, lib. 13, c. 15, 16.

(o) 6 Cl. & Fin. 794.

(q) Bract. 425.

by proving his majority he might be freed from wardship.(r) The writ was directed to the sheriff of the county \*where the heir was born; and Staunforde asserts that it was "re- [ \*492 ] quired by the law, that every one that should pass in the inquest should be of the age of forty-three years,(s) meaning thereby that they and every one of them should be of full age at the birth of the child, because that such have better knowledge and remembrance than others of lesser age have."(t) Besides this, their memory was to receive the following remarkable assistance: the heir was to be called upon to "inform the inquest by certain signs and tokens of the time of his birth, as to say that that year there was a great tempest, or a great plague, or such like,(u) which signs so given in evidence would be returned by the sheriff, as well as the principal matter."(v)

Dugdale extracts a deposition from the *probatio ætatis* of John de Holland, Earl of Huntingdon, in the 6th of Hen. 7th; for the purpose of shewing the ancient method of solemnizing baptism. The witness states the age of the Earl from his recollection of this ceremony, and conformably to what is required in Staunforde, minutely describes the presents given by the godfathers to the child and its nurse, the procession to the church with torches, and other imposing circumstances, which had made an impression on his memory.(w) But although before the institution of parish registers no higher mode of proof is mentioned in legal writers, there is no doubt that recourse must all along have been had to such sources of written evidence as were existent and available. Thus, an entry appears in a monastic register in the year 1268, which shews that there were records sometimes resorted to even at that early period for the purpose of proving age.(x)

As affording some test of the truth of pedigrees where [ \*433 ] the \*consanguinity is remote, attention should always be paid to the number of generations in any given period. A generation is considered the interval between the birth of a father and the birth of a son, and is of course of uncertain length, depending on accidental circumstances, and also on the mode of reckoning whether by eldest, middle, or youngest sons. Thirty-three years have usually been allowed as the mean length of a generation, or three generations for every hundred years.(y) The variations from this average in pedigrees of any length will seldom be found considerable.(z)

(r) Regist. Brev. 296; Fitz. N. B. 253 E.; 1 Roll. Rep. 305. A record of the trial of age by inspection of the court is printed in Booth on Real Actions, p. 147.

(s) In Redman's Fitz. N. B. 219, it is "forty-two years at the least, so that he was of full age at the time that he that sueth the writ was borne." And the same age is required in Sheppard's Ab. tit. Tryal, and Hobart, 325.

(t) Staunforde Præf. Reg. 79.

(u) The reader will remember the circumstantial memory of Juliet's nurse. "It is now fifteen years since the earthquake, and she was weaned of all days in the year upon that day."

(v) Staunforde, ubi sup.

(w) Antiquities of Warwickshire. These writs, and the returns made to them, are still preserved among the inquisitions *post mortem* at the Tower and Rolls Chapel, and it seems not improbable that by their reference to striking occurrences they might be a means of settling disputed dates of events, and otherwise enriching our history. (x) Post, part 2.

(y) Hale's Chronology, vol. 1, p. 80. Nicolas's Chronology of History, p. 181.

(z) Gibbon detects the falsehood of the received genealogy of Mahomet by its reckoning from Ismael to the prophet, a period of two thousand five hundred years, thirty instead of seventy-five generations. Decline and Fall, c. 50. Sir Isaac Newton and Sir Wm. Jones have tested and settled ancient chronology by means of the generations counted. Newton's Chronology; Sir W. Jones's Works, vol. 1, 281, 321. And Bishop Gray has removed some difficulties of this nature in the Scripture genealogies. Key to the Old Testament, p. 177.

The evidence of consanguinity by means of successive filiations being, as before observed, generally of an inferior character, there is less room for those variations in the strictness of proof required to establish it, which take place with respect to other matters of pedigree, according to the occasion and subject of the claim, and the greater or less difficulty of retracing an erroneous step. It does not appear that in any case the impossibility of giving direct evidence must be shown before declarations will be received. Parochial registers of baptism would undoubtedly be in all cases considered the highest and most conclusive species of evidence: but there seems no authority for saying that the absence of these must be accounted for, in order to let in evidence of a less authoritative kind. The contrary seems to be the conclusion, from the language of Sir Wm. Scott, in the case of *Burgess v. Burgess*.(a)

There is a distinction between the practice of the Courts of Law and Equity, and that of the House of Lords, in regard to the proof of filiation by means of parish registers: the former being satisfied with properly certified extracts, whilst the latter, since the *Chandos Peer-* [ \*434 ] *age case*, requires, with some exceptions, \*the production of the originals.(b) It is conceived also, that the rule of the House of Lords stated in a former page(c) with respect to marriage, viz. that it is necessary to prove that search had been made for registers before letting in reputation, will be held to apply to filiation.

The evidence of filiation which the conveyancer first calls for, and upon which he principally relies, is that which is derived from parochial registers: but as, owing to the very limited operation of that class of records, numerous cases occur in which that source of proof fails, it is obvious that recourse must often be had to other quarters.

It would be vain to attempt to marshal the different sources of evidence of reputation according to any imaginary scale of value, or to lay down a rule for ascertaining what amount of proof will be sufficient to establish any fact of filiation. Each separate piece of evidence must be judged of according to the peculiar circumstances attending it, and will gain or lose weight in proportion as it is confirmed or contradicted by others. It will be sufficient therefore, in addition to the remarks already made, to refer the reader to what has been stated in former pages with respect to the amount of evidence that a purchaser is entitled to require.(d)

The modes of proving the requisite qualities of consanguinity having been pointed out, it is necessary to notice briefly the evidence of two impediments which may obstruct the inheritable blood, even where those qualities have been shown to exist. These impediments are alienage and attainder. There are not many authorities respecting the evidence by which the existence of these obstructions may be established: but with respect to alienage, it has been decided that hearsay evidence is not admissible to prove the place of birth of any party.

[ \*435 ] In the case of the *King v. Inhabitants of Erith*,(e) in order to \*prove the place of birth of a pauper, the decla-

(a) 1 Hagg. Cons. Rep. 384, (4 E. Ecc. R.)

(b) See further observations on this subject in the third part of this work.

(c) See p. 243.

(d) See p. 163. 179. 230. 261.

(e) 8 East, 539.

relations of his father, who was then dead, as to the place of his birth, were put in; but after taking time to consider, Lord Ellenborough delivered the opinion of the Court of King's Bench, that the evidence was inadmissible: he said the point of the case turned on a single fact, involving no question but that of locality, and therefore not falling within the principle of, or governed by the rules applicable to cases of pedigree, and was to be proved therefore as other facts generally are proved according to the ordinary course of the common law, that is, by evidence to which the objection of hearsay does not apply.

It has also been decided that a parochial register of baptism is not evidence that the person baptised was born in the parish; (f) but it was observed in that case, that if the child were proved to have been very young at the time of baptism, it would afford a strong presumption of the birth having taken place in the parish, and of course the presumption in such a case would be much stronger that the child was born within the kingdom.

Various acts of Parliament have been passed, for the purpose of supplying government with information of what aliens are from time to time resident in this country. The first act of this nature was the 56 Geo. 3, c. 86, which was renewed by subsequent acts, until the 7 Geo. 4, c. 54, which is now in operation. Under the provisions of that act, a register is kept at the Alien Office at Westminster, of the residence, name, rank, occupation, and description of all aliens residents in this country. Private acts of naturalization sometimes remove the impediment of alienage, not only in the party naturalized, but in his ancestors. (g)

Attainder being the legal consequence of a judgment in outlawry in a case of felony, or the sentence of the Court upon conviction of a capital offence, can only be proved by regular evidence of the judgment or sentence which created it. This \*must be by [ \*436 ] production of the record itself, or an authentic copy of it. In the case of *The King v. Inhabitants of Castell Careinion*, Laurence, J. said, the books are uniform in requiring the production of the record to prove a witness convicted of an offence. (h) And other authorities mention the production of the record itself as essential. (i) It may be questioned, however, whether these authorities can be considered as intended to exclude the rule of law which admits copies of records properly authenticated by the seal of the Court, or otherwise, to be received in evidence. (j)

The effect of the case above stated, (k) is to establish that attainder cannot be proved against a person so as to deprive a third party of the benefit of his testimony, except by proof of the record of his conviction and sentence: and from the language of Lord Ellenborough in that case, it would seem that in no case, and for no purpose, even as against the convict himself, could the attainder be proved by his admission, or otherwise than by proof of the record.

(f) *Rex v. North Petherton*, 5 B. & C. 508, (11 E. C. L. R.)

(g) An act of this kind (2 W. & M. c. 17) was put in evidence on the claim of William Ferdinand Carey to the barony of Hunsdon, anno 1707. MS. 6694. (h) 8 East, 79.

(i) Vin. Ab. Ev. A b, 62, pl. 6; Hawk. P. C. book 2, c. 46, s. 100; Salk. 461.

(j) See Phil. & Am. Ev. 2, 612, 616. Bul. N. P. 226 a.

(k) 6 East, 78.

The rigour of the Common Law with respect to the disabling effects of alienage and attainder, has been much softened by statutes. By 11 & 12 Wm. 3, c. 6, and 25 Geo. 3, c. 39, descent may be traced through alien ancestors, provided the person claiming through them is in existence, and capable of taking as heir at the death of the person last seised. These statutes, by putting an end to the obstruction of descent arising from alienage, have much narrowed the field of inquiry respecting this species of disability and the evidences of it. Such inquiry, however, is still called for in the investigation of titles to land, because, though descents may be traced through an alien, yet if the title was actually vested in him, as by devise or purchase in his own name, such vesting would work a forfeiture, and the title would be defective.<sup>(l)</sup> It has been observed, that this defect of title does not [ \*437 ] appear necessarily on the face of the abstract; and that the \*attention of the conveyancer is only drawn to the point when the name or address is evidently foreign; whilst it is obvious that the defect may exist without any such indication of its presence.<sup>(m)</sup>

The statutes 54 Geo. 3, c. 145, 3 & 4 Wm. 4, c. 106, and 4 & 5 Wm. 4, c. 23, have effected a similar relaxation in the law of attainder. Under the first of these statutes, no attainder, except for *treason or murder*, extends to disinherit any person, or prejudice any other right than that of the offender for his life only. And under the second, descent may be traced through any person attainted, unless the land shall have escheated before January 1, 1834. The last act relieves against the effect of the attainder of trustees and mortgagees.

[ \*438 ]

## \*CHAPTER VI.

### OF THE PROOF OF IDENTITY.

THE identity of the persons to whom evidence relates, with the persons respecting whom the facts, the subject-matter of that evidence, are alleged to have occurred, has for convenience sake been assumed in the preceding heads of proof. Although not properly a distinct species of fact, but rather an essential part of each fact which has been discussed, this identity has been reserved for separate consideration, because the form in which most evidence of succession presents itself, makes it incumbent on the practitioner to show by independent means the identity of the persons in his different proofs. For it rarely happens that the evidence of the principal fact will also establish the identity. This may be done where a witness deposing to a transaction from his own knowledge can also, by his knowledge of the parties, connect them with those respecting whom such transaction is alleged. Sometimes also in hearsay declarations, the extrinsically established relationship of the declarant to the family in question, coupled with the tenor of the declarations, may make them sufficient evidence of identity as well as of the facts declared to. But ordinary

(l) *Fish v. Klein*, 2 Mer. 431.

(m) *Jarm. Convey. by Sweet*, 1, 149.

written evidence establishes no more than that certain facts took place in relation to certain persons bearing the names or other characteristics therein mentioned.(a)

Thus the entry of names and titles in a register, either for marriages or births, is not evidence of the marriage or birth of any person, unless his identity with the person named in the entry is proved.(b) So a register of marriage proves only, in Lord \*Mansfield's words, a marriage, in fact, between two parties, [ \*439 ] describing themselves by such and such names and places of abode.(c) Again, where a party's title to sue is derived from some record or instrument, his bearing the same name merely with the person therein mentioned, will not of itself, establish that he is the same person. And therefore, in ejectment by devisees of copyholds, it was held to be necessary, after proving the admission of persons of the same names as the lessors of the plaintiff to adduce further evidence of their identity.(d)

The description of a record or document may, indeed, be so copious or so peculiar as to make agreement in it alone sufficient *prima facie* evidence of identity;(e) but this rarely happens, and further and extrinsic proof is in general required.(f)

Witnesses actually present at the principal transaction, may yet be unable to identify the parties;(g) thus in the case of a marriage, it might happen that neither the minister, clerk, nor any of the subscribing witnesses were acquainted with the married couple.(h) That a very limited acquaintance, however, may suffice for this purpose appears from the following case, which, though one of criminal conversation, may be detailed here, because, as regards identity, it was in the judgment assimilated to a claim of heirship.

A witness swore that in the year 1769,(i) he was present when the plaintiff was married in a church at Kinsale in Ireland, to a lady of the name of Rixon. That he had seen them frequently together before marriage. That in 1777 or 1778, he saw the lady again at Cork, where she then resided. That from the time of the marriage, she had always gone by the name of Mrs. Hemmings. That he had not seen her since the time of her \*residing at Cork, but [ \*440 ] he had no reason to doubt that she was the same person who lately passed as the plaintiff's wife.

It was contended that this was not sufficient evidence of the wife's identity to be left to a jury. But Lord Mansfield observed, "the identity of the person frequently does not appear to the minister who performs the ceremony, or the attesting witnesses. Therefore the identity so as to connect the marriage in fact with the person in question in the action, may be proved by other persons or circumstances. Here the question is, whether there was any evidence of identity to be

(a) See *Brown v. Petre*, 2 Swanst. 235; Bull. N. P. 247.

(b) *Draycot v. Talbot*, 3 Bro. P. C. 564.

(c) 1 Doug. 174.

(d) *Dee d. Hanson v. Smith*, 1 Camp. 195.

(e) See *Hennell v. Lyon*, 1 B. & Ald. 182.

(f) *Barber v. Holmes*, 3 Esp. N. P. C. 189; *Hodgkinson v. Willis*, 3 Camp. 401; *Burman v. Nerot*, 1 Carr. & Payne, 578, (11 E. Eco. R.)

(g) *Middleton v. Sanford*, 4 Camp. 34; *Rex v. Watkinson*, 2 Strange, 1122.

(h) Per Lord Mansfield, 1 Doug. 174.

(i) *Hemmings v. Smith*, 4 Doug. 33, (36 E. C. L. R.)



left to the jury? As to the weight of evidence, it depends on this, whether it is or is not answered. Loose evidence becomes cogent when it is not answered. It is possible that the wife may be dead, and the plaintiff married to another person; but evidence need not be certain to every intent. Lord Coke defines certainty three ways: (j) certainty to a common intent, a certain intent in general, and a certain intent in every particular. A certainty to every intent is not required here. I think the evidence, though weak, was sufficient to be left to the jury." Buller, J., said, "Upon the point of identity there is no difference between this action and others. Suppose a person had claimed as the heir of this woman, it would be evidence to be received that she is the same. I am not disposed to think the jury have drawn a wrong judgment."

But where declarations are tendered as of a party to the suit, it is a question for the Judge and not for the jury whether there is sufficient evidence of the identity of the declarant. (k) On the kind of evidence of identity which may be adduced, the following case affords some information:—Blackstone, J., had held at *Nisi Prius*, that in proving a marriage, under Lord Hardwicke's Act, the proper evidence of the identity was the testimony of the subscribing witnesses; and that until they were shewn to be dead he could not admit other evidence; but his opinion was overruled in *Banco*, and it was said that the parties might be identified in a thousand ways, e. g. by the bell ringers, [ \*441 ] who should prove that \*immediately after the marriage they were paid by the parties—by proof of their handwriting—by persons who were present at the wedding dinner, or by a servant who should prove that the wife went by her maiden name till the day of the marriage, and that she then went out, and on her return and ever since was called as a married woman, by her husband's name. (l)

Such evidence may, however, be sufficient or insufficient according to the purpose for which it is required. Very good proof of identity must be obtained before the Ecclesiastical Court will pronounce a marriage void by reason of a former one subsisting. (m) There is a decree of *confrontation* under which the party is produced to witnesses who have known him sustaining both characters, or some of whom have known him in each. (n) And in criminal cases generally strict evidence of identity is requisite. (o)

On the other hand, in civil cases the leaning of the Courts is in favour of relieving parties from the *onus* of proving identity, as it is a fact which in general is more easy to disprove than establish. (p)

In conveyancing, identity is established by the affidavit or statutory declaration, and in interlocutory applications to the Courts, by the affidavit of some one who has personal knowledge of the individual. Where the party to be identified is one named in a register, an examined copy of the register should either head or be annexed to the affi-

(j) Co. Lit. 303 a.

(k) *Corfield v. Parsons*, 1 Cr. & Mes. 730.

(l) *Birt v. Barlow*, 1 Doug. 171.

(m) *Searle v. Price*, 2 Hagg. C. R. 187, (4 E. Ecc. R.)

(n) 2 Hagg. C. R. 190, (4 E. Ecc. R.)

(o) *Rex v. Benson*, 2 Camp. 508, and per Lord Ellenborough, 1 B. & Ald. 186.

(p) Per Lord Tentarden, *Hennell v. Lyon*, 1 B. & Ald. 187.

avit, and if the same person who examined the copy with the register, can also prove the identity, his single affidavit will suffice for both purposes. Where this cannot be done the witnesses to the identity may make either separate affidavits, or a joint affidavit.

Where the principal fact is proved by affidavit alone, another may be required to shew the identity. Thus where the death of \*a tenant for life was proved in this manner, Lord [ \*442 ] Thurlow required another affidavit that that person was the party in the cause.(g)

In transfers of stock at the bank the seller must be identified by a witness who is usually the broker employed. Where the transfer is into the Court of Chancery, the broker is allowed a fee to identify, but no per centage commission.

On entering into evidence in equity the first interrogatory is always framed to identify the parties to the suit, by means of the personal knowledge of the witness, and thereby to lay a foundation for the questions which follow. In some of these it is also frequently necessary for the same purpose to interrogate as to the witness's knowledge of the testator, intestate, or other material person appearing in the cause.

Where the identity of devisees, legatees, or objects of a trust or limitation, or of heirs or next of kin is doubtful or not admitted, the first general interrogatory is seldom relied upon, but it is deemed advisable to have special interrogatories to establish the fact. In drawing these it is to be remembered that though a party's own identity cannot well be carried further back than the baptismal or natal register, yet where his title depends upon his relationship to another person, it will be further necessary to identify that person as being the *propositus* referred to by the testator, or heading the pedigree, as the case may be, and the intermediate persons, if any, by which the party is connected with him.

And the rule is applicable in conveyancing; for where a party's title to convey consists in his possession of a character of which his filiation or descent is an essential component, there is the same reason for requiring evidence of the identity of his parent or ancestors as of his own in cases where his title is merely personal.

Where, however, legatees were described in the will by their names and residences, and they were also stated to be \*grand-children of the testator's sister, Lord Loughborough held [ \*443 ] their identity sufficiently proved by witnesses deposing to agreement in the former particulars, considering that the will sufficiently connected them, it being not a question of pedigree, but only of identity.(r)

Hitherto it has been supposed that the identity is capable of proof by direct living testimony, and where this is attainable, the only difficulty is with the witnesses or deponents in considering whether they can swear that the party known to them under certain circumstances, is the same with one appearing upon the occasion in question. If identity cannot be so proved, and especially where the failure of this evidence arises from the facts being beyond living memory, there is perhaps no part of his duty which to a greater degree tasks the abil-

(g) 10 Ves. 289.

(r) Campbell v. French, 3 Ves. 322.

ity of the practitioner, whether in equity, conveyancing or ejectment, than that of identifying neatly, and without loading his case or abstract, the persons to whom his principal evidence relates. It will assist him to decide what kind of evidence of identity should be adduced, and how much ought to satisfy, if attention be fixed on the reason why it is necessary. This is simply because two or more persons may have common characteristics, that is, may be perfectly similar in particulars by which they are distinguished or described. If it were true that every individual had any peculiar mark or designation, natural or imposed, which once impressed was adherent and indelible, the possession of that peculiarity by the person in the case and the person in the evidence (no incongruity of time or circumstances being shewn) would conclusively prove them to be the same: or could it be established that a certain number of persons only had any one characteristic in common, it might be determined what were the probabilities that a person of whom this characteristic was proved was identical with one appearing so distinguished upon a different occasion.

The force of a peculiar characteristic may be seen in the designation of peers. In proving a transaction to which the Earl of Mans-  
[ \*444 ] field is *eo nomine* mentioned to have been a party, the question of identity is narrowed to one of time; (s) the law taking notice that there is but one person at one time having the same dignity. (t)

This view of the subject is important, as shewing that a concordance in name alone is always *some evidence* of identity, and that it is not correct to say with the books, that besides proof of the facts in relation to the persons named, their identity must be shewn, implying that the agreement of name goes for nothing, whereas it is always a considerable step towards that conclusion, and is in truth of more value than any of those facts taken separately by which identity is usually said to be established, such as correspondence of residence, vocation, or ownership of property; and this will appear from the greater difficulty of surmounting a discrepancy in name than one in any of the other particulars.

But inasmuch as every name or other characteristic may be, as most are, common to several persons, agreement in one such particular is in general too weak a ground upon which to build the desired conclusion. (u) The best foundation upon which that can be rested is pointed out by Lord Bacon, *identitas veré colligitur ex multitudine signorum*. (v) The concurrence of several characteristics has a force in producing the conviction of identity which may be represented by the increase in geometrical *ratio* of the forces of the same characteristics taken singly.

Lord Bacon's maxim, whilst it discloses the sole principle governing the proof of identity, does not in its application exclude all room for doubt. For there is no physical impossibility in the existence of two or more persons perfectly similar in every known or provable

(s) That is of the time of the transaction, and the times of the succession of the different earls to the dignity.

(t) Co. Lit. 3 a.; Hargrave's note (c). Shepp. Touch. 234; 2 Jac. & Walk. 546.

(u) Doe d. Hanson v. Smith; Draycott v. Talbot; Brown v. Petre, cited ante, p. 438, 439.

(v) Rules and Maxims.

characteristic. Accordingly, mathematical certainty on this subject the courts do not require, because they can never attain it. But that high degree of probability which, as the mind acts upon it at once, without taking the small counter probability \*into account, [ \*445 ] is said to amount to moral or practical certainty, is attainable by the concurrence of fewer common marks than might at first be supposed.

From the difficulty of obtaining sufficient *data* the degree of probability which is arrived at cannot always be accurately measured, and but for this obstacle a little calculation would in every case shew the precise approximation of the effect of the evidence to mathematical certainty.

In the Douglas cause it became a material question whether a person who, as it was alleged, had bought or stolen two children from their parents, in Paris, about the time of the appellant's birth there, was the appellant's reputed father, Sir John Stewart; the conclusion from the affirmative being that one of them was the appellant. Elaborate calculations were made in the cause to shew the probabilities in favour of the identity; and although the truth of many of the *data* and of the *enlèvement* itself was impeached, and much of the evidence was ultimately discredited, the reasoning, of which the soundness seems to have been admitted, equally shews the force of several coincident marks or circumstances. (w)

In practice, wherever sufficient *data* can be supplied, the degree of conviction which the evidence ought to insure, may be precisely defined. In cases where such *data* are not forthcoming, they may frequently be assumed with tolerable accuracy. Thus, a few registers, rate-books, or directories, indifferently selected, may form the basis of a calculation of the numerical proportion which persons of a particular name bear to the rest of the population. The relative frequency of particular occupations may be supposed in a similar manner, and allowance being made for the prevalence of certain names and occupations in particular districts, the population of the place of residence, together with any *data* supplied by age, ownership of property, &c., will disclose the united force of several coincident circumstances. In conveyancing, this \*may sometimes overcome a pursuer's objections, by shewing him, that what he may [ \*446 ] consider deficient evidence of identity, does by the proximity of its approaches to mathematical, amount to moral certainty.

The nature and value of the characteristics most useful in evidence of identity will now be examined. It is first observable, that the force of either agreements or discrepancies in any of them, to prove or disprove the identity of the possessor with a person so distinguished upon another occasion, essentially depends upon the question, whether the characteristic is one which has the capacity of being assumed, dismissed, or altered; in the language of logicians—whether it is a separable or an inseparable accident from the individual. The name, occupation, residence, religion, handwriting, and some physical marks,

(w) The conclusion contended for, was that the chances were many millions to one against the *enlèvement* having been committed by any other than Sir J. Stewart. Proceed-  
ings in Douglas cause, vol. 4, p. 302.

are of the former kind; they may be different at different times. The time and place of birth, parentage and consequent consanguinity to others, sex, and some other peculiarities of bodily conformation, are of the latter kind, being always adherent and unchangeable. A concordance in any or all of the first mentioned particulars, does not make identity certain, nor does a difference in them necessarily disprove it; but it follows from the nature of the latter, that though agreement in them is not decisive in favour of identity, (since they may be common to more than one person,) a discrepancy in any one of them is unavoidably fatal to it; and with respect to separate characteristics, the cumulation of points of difference in them, is as powerful to prove diversity or plurality as the concurrence of several common marks to establish identity.

A fallacious mode of reasoning may thus be detected, which is sometimes resorted to by the party whose object is to overcome the effect of several discrepancies in the traces of what is alleged to be the same person appearing on different occasions. By dwelling on each incongruity separately, and opposing to it all the established points of agreement, it may easily be made to appear more probable that there should be such a difference at different times in the description or circumstances of the same person, than that two persons should have existed between whom there was such similarity. Each discrepancy [ \*447 ] being successively \*attacked in this manner, and with the same result, a decision establishing the identity is demanded, on the ground that the probabilities are clearly in its favour; whilst the fact may well be, that, though this is true in each step of the argument, the effect of the whole is, that the probabilities in favour of identity are greatly outweighed by those against it.

To illustrate this by a case which has been cited; (x) Elizabeth Jennens, the ancestress of the plaintiff, was shewn to have been in adult life, a Roman Catholic. The family with whom it was endeavoured to connect her were Protestant. Suppose it to be more probable that she should have changed her religion than that there should have been two or more persons of one name, district, and period, and corresponding in some other particulars, and let the relative probabilities be as 2 to 1; whereby if the truth be denoted by unity, the greater probability may be represented by the fraction  $\frac{2}{3}$ . But it was further proved that the plaintiff's ancestress could not (for the will would, no doubt, accompany the ability) write her name, but made her mark. Let it again be conceded to be more probable by 5 to 4, (equal to  $\frac{5}{9}$  of the truth,) that the daughter of an opulent family should have been so much neglected in youth, or incapacitated by disease, or other causes, as to have been unable to write, than that there should have been more than one Elizabeth Jennens, with the proved characteristics in common. The chances in each step of the argument are thus in favour of the identity; but the result from both is to be ascertained by multiplying the fractions into each other,  $\frac{2}{3} \times \frac{5}{9}$ , which will give  $\frac{10}{27}$  as indicating the degree of likelihood that there was but one Elizabeth Jennens; that is, the probabilities are as 10 in favour of that conclusion, to 17 against it.

(x) *Hood v. Lady Beauchamp*, *ibid.*, p. 315.

Of course, a very few more incongruities would make the preponderance of probability against the identity overwhelming; and in this case, several others being proved, the Vice Chancellor thought it so clear that the plaintiff's ancestress was not the iron-master's daughter, that he refused an issue to try (what depended \*on such identity,) the plaintiff's proximity of kindred to the intestate in the cause. [ \*448 ]

Questions on the identity of living persons rarely arising in relation to succession,(y) physical characteristics may be shortly disposed of. When the case is one of personation, the impostor will, of course, assume the name, description, and such other characteristics of his principal as are capable of assumption;(z) and these may include some physical marks, such as the colour of the hair, and other peculiarities of form. The change of these must, however, have been produced by agents, the use of which is, in general, capable of detection, by medical science.(a)

On the features, the most obvious and peculiar of physical characteristics, Lord Mansfield has observed, that the distinction between individuals in the human species is more discernible than in other animals. A man may survey ten thousand people before he sees two faces perfectly alike, and in an army of a hundred thousand men, every one may be known from another.(b) Cases of persons undistinguishable from each other by this test, have, nevertheless, occasionally occurred. Several are recorded by Pliny,(c) and in the *Causes Célèbres*;(d) but in this country, they seem to have been less frequent, or, at least, less frequently to have given rise to litigation, and such as have occurred, are to be found only in the annals of criminal jurisprudence.(e)

Those who have considered this subject, attach less importance \*to the features, which are often found to undergo great alteration,(f) than to peculiar marks, such as *naevi*, cicatrices, fractures, and natural deformities.(g) Sometimes marks, which have been effaced, may be brought out by proper means. A criminal who had escaped from prison, after being branded, had obliterated, and apparently destroyed the mark, by causing an eruption over the whole surface, but he was long afterwards identified by Foderé, who applied a cold plate of metal, which made the other parts pale, whilst the fatal letters appeared in distinct relief.(h) [ \*449 ]

(y) See on *partus suppositus*, ante, p. 384.

(z) See Attorney General v. Fadden, 1 Price, 403.

(a) Orfila has an article on this subject, *Annales d'Hygiène*, t. 13, p. 466. See Beck, 378 n.

(b) 2 Coll. Jurid. 402.

(c) In his chapter on cases of resemblance, he notices, as scarcely distinguishable, Pompey, and Vibius, a plebeian; the consuls Lentulus, and Metellus, and the impostor Artemon, and Antiochus, king of Syria.

(d) These are almost all cases of disputed succession or possession of status. They are collected by Foderé, *Med. Legale*, t. 1, c. 2.

(e) Cases of Squires the gipsy, on the trial of Elizabeth Canning, 19 How. St. Tr. 283; Frank Douglas, 1 Paris & Fonb. 222; Ibid. 3, 143. Other cases are mentioned, 28 How. St. Tr. 819. And see on the mode of trying the identity of prisoners after conviction, 4 Bl. Com. 396; Charles Ratcliffe's case in the State Trials; Rex v. Rogers, 3 Burr. 1809.

(f) See the case of Casali, who was in danger of being denied his status and property, owing to a change of appearance during thirty years absence. *Zaccarias* Cons. 61; Beck, 1; Paris & Fonb. *ubi sup.*

(g) See Beck, c. 11; Paris & Fonb. *ubi sup.*

(h) *Med. Legale*, *ubi sup.*

The previous history of a party may assist in his personal identification. Thus some occupations leave traces, by developing, or otherwise affecting particular members. And the same history will supply a test of the identity of *mind* by trying the party's knowledge of facts of which he must be cognizant, if he be the person alleged. On the other hand, this knowledge as betrayed by declarations may be used as evidence of identity against him.<sup>(i)</sup>

But these means of identification, for the most part, perish with the bearers, and can be proved and used only by their contemporaries;<sup>(j)</sup> and attention will be more usefully directed to those descriptive signs or characteristics by which persons are distinguished in writings, and may be identified notwithstanding their decease.

[ \*450 ] \*As the most prominent of these the name first demands consideration. Its value in evidence, either for or against identity, must obviously depend upon the occasions and rules of its imposition, and its susceptibility of change.

In both particulars the Christian name has always had the advantage of the surname. The law considers it as certainly and regularly imposed, it being said to be repugnant that there should be a Christian without a name of baptism, and it is legally adherent through life because the church allows of no rebaptising.<sup>(k)</sup> Wherefore Lord Coke recommends that "special heed be taken to the name of baptism for that a man cannot have two names of baptism as he may have divers surnames."<sup>(l)</sup> And he elsewhere says, that "it is holden in our ancient books that a man may have divers names at divers times, but not divers Christian names." On one occasion only the baptismal name might legally be altered. If the bishop at confirmation called the recipient by a different name from that given at the baptism, the name of confirmation became thenceforth the proper Christian name.<sup>(m)</sup> Thus Chief Justice Gawdy's baptismal name was Thomas, but having been confirmed by that of Francis, he bore the latter, and by the advice of all the judges, used it in his purchases and grants.<sup>(n)</sup> But on the revival of the liturgy, at the Restoration, a change took place in the form of the office of confirmation, and the

(i) *Rex v. Price*, 6 East, 323.

(j) Such as survive are ably discussed by Orfila and Devergie. The former enumerates eleven rules for investigating, by their means, cases of doubtful identity of dead persons. There are some recent remarkable instances in this country of such identification after the lapse of centuries. See the accounts of the opening of the tombs of St. Cuthbert, (by my friend the Rev. James Raine,) of Charles I., (by Sir Henry Hallford,) and of Hampden, (by Lord Nugent.)

Physical characteristics, although they give rise to many names, appear never to have formed in this country part of the description in instruments, as they did amongst nations of antiquity. An example of the practice is given by Dr. Young, (*Account of Discoveries*, 1823, p. 65), from the Greek Papyrus of Anastasius, where in a conveyance of land, the parties are described, in addition to their names, by their ages, stature, complexion, features, peculiar marks, &c., as in a modern passport.

(k) See 5 Bac. Ab. 593.

(l) Co. Lit. 3 a, and see Hargrave's note (5)

(m) Co. Lit. 3; Fitzh. Grant, 67.

(n) Two of the sons of Henry II., of France, by Catherine de Medici, changed their names at confirmation. According to some authorities, the baptismal name might be retained with that of confirmation, 6 Mod. 115; 2 Lord Raym. 1015. By a provincial constitution of Archbishop Peccham, A. D. 1281, it is provided that no wanton names be given to children, or if they be, that they be changed at confirmation. Gibb. Cod. vol. 1, p. 440, Camden's Remains.

bishop no longer mentioning the Christian name, alterations in it ceased to be effectually made otherwise than by Act of Parliament.(o)

There is, indeed, in the Romish Church another occasion, namely profession, upon which the Christian name is changed;(p) but according to Lord Thurlow, the conventual name is not meant [ \*451 ] \*for the rest of the world, in regard to whom the former name continues; and he distinguished this change from that at confirmation, when by the received law of the country, the name of confirmation became the real name. The practice ought however to be borne in mind in genealogical inquiries relating to Roman Catholic families. In the Stafford case it was proved, in order to shew the personal identity, notwithstanding the difference between their baptismal and conventual names, of several members of the family who had become professed as nuns.(q)

For several legal purposes also a party may acquire a new Christian as well as surname, by arbitrary assumption and common use; and the histories of some persons through whom a descent is to be traced, may disclose reasons why they should have encountered the certain inconvenience and the risk of injury attending a change of this kind.(r)

In the case of persons to whom several Christian names were given, a partial alteration may have taken place by the dropping of some or one of them; for by a rule as old as the time of Bracton.(s) the bearers would, in law, be sufficiently described by such as they retained or more frequently used.

The value of the surname as a characteristic differs from that of the Christian name in the particular of its having always been changeable with greater facility, and in the hereditary quality which it derives from custom, and which makes it to some extent evidence of paternal origin, of identity of family as well as of person.

On the legitimate weight of surnames, both as personal and as family distinctions, considerable light is thrown by their history in this country. Whatever was the period of their introduction,(t) [ \*452 ] \*it seems to be agreed that they were not established on a footing approaching their present, in extent or stability, until about the time of the Reformation. To their previously unsettled use may be ascribed the indifference with which the law regarded them, and

(o) See 2 Burn's Ecc. Law, tit. Confirmation.

(p) 1 Ves. Junr. 416.

(q) Min. Ev. p. 145.

(r) 7 Bing. 455, (20 E. C. L. R.); 5 Bac. Ab. tit. Misnomer; Shepp. Touch. 233.

(s) *Si quis binominis fuerit, sive in nomine proprio, sive in cognomine, illud nomen tenendum erit, quo solet frequentius appellari.* Bract. fol. 1836, and see Addis, demandant, 7 Bing. 455, (20 E. C. L. R.)

(t) Camden (Remains, 135), and Sharon Turner (Ang. Sax. vol. 3, p. 11,) perceive them in Saxon Times. Sismondi (Hist. France, t. 4, p. 544,) says they were invented, together with armorial bearings, in the first crusade, 1096. Sir F. Palgrave (1 Parl. Writs, 409,) dates their establishment in England in the time of Edward I. Mr. Lynch (View of Feudal Dignities, p. 230,) shews that at the end of the 15th century, they were not settled even among noble families in Ireland. Sir Joseph Jekyll, (3 P. Wms. 65,) and Daines Barrington, (Observations on Stat. 372,) say they are of no great antiquity; and according to the latter, they had not in the last century, and probably have not yet (see 2 Bythew. Convey. 654,) become universal in Wales. See further, a paper by Mr. Markland, on the antiquity and introduction of surnames; Archæologia, vol. 18, p. 105. And on their origin and use in all nations, there is a mine of information in the Nouveau Traité de Diplomatique, t. 4, p. 559.



which no doubt had reciprocal influence upon the popular practice. There is a striking instance of this in the 8th Edward III. a period rather distinguished for the importance attributed to matters of form. A defendant in formedon pleaded in abatement that the deed shewed a remainder to Adam le Fitz Richard, and that the writ required that the tenements should remain to Adam de Armeston, but the plea was overruled on the ground that the person was the same.(u)

Referring to the writers cited for more particular information on surnames, it is to be observed here that their hereditary quality, originating merely in the obvious convenience of designating a child by its father's name(g) in the absence of one conferred by personal distinction, is entirely the creature of custom. This growing inveterate, the law came to regard the *cognomen majorum ex sanguine tractum*,(w) [ \*458 ] and to consider the father's surname as \*that of the child, unless the contrary should appear, whence the issue is guardedly spoken of as in law and in truth carrying the surname of the father.(x) But the rule has never been applied so as to alter the originally free and arbitrary assumption of surnames, and they might always and may still, be taken and changed at pleasure.(y) And bastards who have no legal father cannot have a surname except by acquisition in the primary mode.(z)

If to this legal mutability of surnames ever since their first hereditary use in this country be joined the circumstance in their origin, that most of them, especially such as are derived from parentage, residence, trade, office, personal character or appearance, and the like, would, in all probability, be applied as primary designations to numbers of persons not necessarily related to each other, who thus would form so many independent stocks of the name, it will be perceived how unwarrantable it is to consider community of surname as indicative of some agnate consanguinity more or less remote.

But the absence of such consanguinity is shewn by a discrepancy in the surname proving a breach in the chain of male descent unless a new name was somewhere assumed. Changes of surname are also serious obstacles to identification both of families and individuals, and the most common causes and occasions of such alteration are therefore deserving of notice.

Perhaps the most prevalent cause after surnames had become at all hereditary, was the practice of younger sons dismissing their father's name, and assuming that of the lands he gave them, or of their own residence.(a) Hence, it is observed, there are sometimes found in.

(u) Pasch. 8 Ed. 3, 19 b, cited 1 Palgr. Parl. Writs, 409.

(v) This remains evident in the large class of surnames indicative of filiation, which commence with *Fils, Moc, O', Ap, or Ben*, or terminate in *son, ing, or lang*. Camden notices the formation of surnames in the same manner amongst the ancients, *Remains*, p. 168. In Syria and Arabia, they are formed in an inverse way, the parents taking a name from their first born son, thus, Abu-Michael, meaning the father of Michael. Jowett's *Researches*, cited Turner's *Ang. Sax.* vol. 3, p. 11. In Cornwall, Wales, on the borders of Scotland and in Languedoc, the peasantry took the father's Christian name without any other addition than their own. Camden, 169. Barrington on the 34 Ed. 3, c. 22. The custom also prevailed even in noble Irish families, (Lynch's *Feudal Institutions*, p. 230,) and still continues in Wales, (the son using his father's Christian name as a surname,) and is said to be a cause of perplexity in Welsh titles, 2 Bythew. *Conv.* by Jarm. 654.

(w) Sir Moyle Finch's case, 6 Rep. 65.

(x) 6 Rep. 66.

(y) 3 P. Wms. 65.

(z) Co. Lit. 8 a.

(a) Several instances are given by Camden, *Remains*, 179.

three descents as many different surnames in the same family.(b) A well-known instance of the custom appears in the descent of the Marquis of Bath from one of the Bottevelles, who having resided at one of the Inns of Court, was thence called John of the Inne or Thynne.(c) Smith, *Rougedragon*, in 1586, \*laments the practice as [ \*454 ] having "overthrowne and brought into oblivion many [ \*454 ] ancient houses in this realme."(d) Camden shews the extent of it by an example in which no less than nine changes of surname took place in only three generations of male descendants from a common ancestor named Belward.(e)

In Ireland, the younger branches sometimes took surnames from the titles of honour borne by the heads of their families. Thus the brothers of the Earl of Desmond are, in letters-patent of Hen. 7, called "Thomas of Desmond," "John of Desmond," &c., and Mr. Lynch observes, that this disuse of family names leaves the inquiry open to many doubts and misconceptions.(f)

At one time a regular occasion of change of surname was ordination. It was then the "fashion to take away the father's surname (were it never so much worshipped or ancient) and give the son for it the name of the town he was born in."(g) Thus, William of Wykeham's patronymic had been Longe, and William Waynflete's Barlow, and these were altogether displaced by their clerical names.(h) The practice fell into disuse soon after the Reformation; but the kindred custom, sanctified by examples of such as Erasmus and Melancthon, survived, and is not yet extinct in Germany, of ecclesiastical and other writers adopting literary appellations, either entirely new, or consisting in a translation of their original names.(i)

A cause more operative in modern times is the commission of offences, inducing a change of name for the purpose of concealment.(j) During the civil wars, instances of this were frequent. The Blounts of Buckinghamshire then took the name of Croke, the Carringtons of Warwickshire that of Smith.(k) In more recent wars also, many cases are known to have occurred of the same step being taken with the same view by deserters from the \*army or navy. And [ \*455 ] in crime, family estrangement, and misfortune, times of [ \*455 ] peace equally supply causes and examples of the practice, and which occasionally present themselves as obstacles in the establishment of titles to property.(l)

Some occasions may be observed of departure from the custom of women at marriage abandoning their own patronymic for that of their husband. The change is not always on the side of the woman, and instances of the husband's assumption of her name and arms, without any public authority, are not unfrequent in former times, especially when she was an heiress and he a cadet.(m) Down to the seventeenth

(b) Lyson's *Cheshire*, 357; *Archæologia*, vol. 18, p. 106.

(c) Bigland's *Observations*, p. 6.

(d) Cited from a tract in the Bodleian, by Dallaway, *Herald*, Inq. 198.

(e) *Remains*, ubi sup.; Bigland, p. 5.

(f) *Fœdal Institutions*, p. 231.

(g) Holinshed, *Chron.* 232.

(h) Lowth's *Life of Wykeham*, p. 9; Chandler's *Life of Waynflete*, p. 10.

(i) See Hallam, *Int. to Lit. of Europe*, l. 358.

(j) Camden, 189.

(k) Fuller's *Worthies*, p. 51; Barrington's *Observ. on Stat.* p. 372.

(l) See *Stiven v. Parkes*, post, p. 457.

(m) Dallaway, *Herald*, Inq. 198; Camden, 181.

century, and probably later, married women and widows are found sometimes to retain their maiden names with an *alias*. In the Chandos case there was much discussion upon the meaning of the description of a testatrix as "Anne Jackson *alias* Bridges,"<sup>(n)</sup> and in evidence of the explanation contended for, several instances were adduced from contemporary documents. Camden<sup>(o)</sup> says that in his time, in France and the Netherlands, both the maiden and marital names were used, the maiden name being added without any *alias*, and according to another authority, it always appears upon the tombstone.<sup>(p)</sup> In Scotland, and more particularly in Wales, married women and widows still use their maiden name upon many occasions, thus executing instruments by it, even though described in them by the marital name.<sup>(q)</sup> But in deeds prepared in Scotland they are described by both names, as they ought always to be when it is known that they will not conform to the English practice.<sup>(r)</sup>

The performance of a condition imposed by a testator or settlor, compliance with his wishes or regard to a benefactor or relative,<sup>(s)</sup> are also common reasons and motives of change of surname. Mere caprice also sometimes operates. In the Berkeley Peerage case it [ \*456 ] appeared that the Countess of Berkeley and her brother \*had changed their name from Cole to Tudor. The time of this change became an important question in the case, the brother having subscribed the register of the first marriage by the name of Tudor, which it was endeavoured to show he did not use until long after the date of that alleged occurrence.<sup>(t)</sup>

With respect to the modes of effecting the change it is to be recollected that the royal license is no more than a permission to take the name, and does not give it,<sup>(u)</sup> and that, therefore, a change in that way is still by voluntary assumption.

The practice, is, however, of considerable antiquity.<sup>(v)</sup> But Sir Joseph Jekyll said he was satisfied the usage of passing Acts of Parliament for imposing surnames was but modern, and that any one might take upon him what surname and as many surnames as he pleased, without any Act of Parliament.<sup>(w)</sup> Most acts for this purpose contain a proviso to prevent the loss of the former name, in order that the party may continue to take by it.<sup>(x)</sup>

The legal changeableness of surname does not involve the power to make the bearers answer a description in a will or settlement. If a legacy is left to a class of relatives of a particular name, and a person answering the description in every other particular, assumes the favoured surname, even before the time of vesting, he will not be entitled; for though he legally bears the name, the intention of the testator is evidently to benefit those only who should bear it by derivation from their ancestors.<sup>(y)</sup>

(n) Min. Ev.; and see Belz's Review.

(o) Remains, 188.

(p) Bigland.

(q) 2 Bythew. Conv. 654.

(r) See on the immateriality (with reference to a testator's intention) of a change of name by marriage. *Pyot v. Pyot*, 1 Vez. Senr. 335.

(s) See *Le Marchant's Gardner Peerage*, 424.

(t) See Min. Ev. 1811.

(u) Per. Lord Eldon, 15 Ves. 100.

(v) *Archæologia*, vol. 18, p. 110.

(w) 3 P. Wms. 67. And see *Doe v. Lescumbe v. Young*, 5 B. & A. 544, (7 E. C. L. R.)

(x) 15 Ves. 100.

(y) *Barlow v. Bateman*, 3 P. Wms. 65; 4 Bro. P. C. 194, S. C. *Leigh v. Leigh*, 15 Ves. 98.

Where the change of name was effected by royal licence, the identity of the bearer of both names may be shown by production of the Earl Marshal's book from the Herald's Office, containing the record of royal licenses for the change of surnames and arms. This was admitted in evidence in the claim to the Rokeby Barony, [ \*457 ] "in order to account for the change of the claimant's name from Robinson to Montagu.(z)

Identity may also be traced through a change of name by persons who have known the party under both appellations, or by different witnesses who can prove that they have known the same individual under each ;(a) or by declarations or letters of the party alluding to events in his history when he bore a different name.(b)

In well-drawn deeds, to which a person who has borne two names is a party, the fact is noticed either in his description or by recital, and this notice is positively necessary when he took the property by one name, and assumes to pass it by another. Where the identity is thus shown it is unusual to require farther evidence. But if the identity is asserted as an extrinsic fact, which will be the case when the vendor has changed his name since he has acquired his property, the purchaser is entitled to have the identity verified by an extract from the Earl Marshal's book, or other equivalent evidence.

In *Stiven v. Parkes*, the question was whether a sequestration obtained against the defendant had determined by his death. It appeared that, in February, 1833, a man described as Sir W. Payne was convicted of felony, at Bury St. Edmonds, and sentenced to transportation. A formal notice having been given by the superintendent of the hospital at Sydney, in New South Wales, stating the death of this Payne, in 1834, such death was regularly returned to the Home Secretary in England. A letter had previously been received from the defendant by a member of his family, dated New South Wales, and containing a request that he might be addressed as William Payne. The letter bore the signature of P. only, but it referred to the vessel in which Payne had sailed, and alluded to the trial at Bury, and other circumstances tending to show that Payne and Parkes were the same person. It was contended that the defendant's death was not \*established, and the fact was relied on that [ \*458 ] though he was possessed of property, no administration had been taken out to his effects. But Lord Cottenham was satisfied by the evidence that Payne was the defendant, and that he died in 1834.(c)

A party's identity may be traced through the acquisition or change of a title of honour(d) by the instrument or enrolment of the instrument conferring the new dignity. In the Stafford case, Humphrey, Earl of Stafford, was identified with Humphrey, Duke of Buckingham, by means of the original Charter Roll of 23 H. 6, n. 33, containing the patent of the Earl's elevation to the Dukedom.(e)

To the causes of obscurity, consisting in total changes of names, must be added their partial variation, arising from unsettled orthography. Instances of this abound in family records of very moderate

(a) *Min. Ev.* 1880, p. 14.

(e) 1 *Doug.* 171; 2 *Hagg. C. R.* 190, (4 *E. Ecc. R.*)

(b) See *Rex v. Price*, 6 *East*, 323.

(c) *MS. Lord Chancellor's Court*, 11 January, 1837.

(d) See *stat. 1 Ed. 6, c. 7, s. 3.*

(e) *Min. Ev.* p. 32.

antiquity. The biographer of Waynflete states that he had noticed seventeen different modes of spelling that name.(f) Villiers is observed to have been spelt in sixteen ways. Four brothers called Rugely, executing the same instrument, in the sixteenth century, spelt their name each in a different manner. And the same person will sometimes be found through carelessness or caprice, from time to time, varying his practice in this important particular.(g)

In the Chandos case some discussion took place on the weight of the difference between Bridge and Bridges in evidence of non-identity of family ;(h) and in Hood v. Beauchamp the same question arose in relation to Jennens and Jennings, but both cases went off upon other points. The facts in them had occurred towards the end of the seventeenth century, but orthography fluctuating less as education advances, the force of a discrepancy in the spelling of surnames will be greater when the bearers lived in recent times and were members of educated families.

[ \*459 ] \*An obstacle in the way of genealogical inquiries closely allied to the last is the difficulty of discovering the true reading of names in old records. Some letters, it is observed, are written precisely in the same manner, and in combinations of those formed by parallel strokes the eye is unable to develop the elements of which the group is composed. Thus, a name which may be either Hauvil or Hanvil has also been read as Haunil, Hannil, and Hamul; Gouiz as Goniz, and it is probable that the name of the baronial family of Novant ought to be read Nonant, although the first orthography has been adopted by Dugdale and his successors.(i) There are few who would not be baffled and thrown out of scent by differences of this kind, which, unlike ordinary variations of orthography, are altogether irreconcilable by reference to pronunciation; and as the ambiguity does not appear in copies either written or printed, nothing can better show the danger of implicit reliance on even the highest second-hand authority.

Another cause of confusion is the practice of translating surnames, which Lord Coke justly condemns, but from which he not so justly states his own profession to be free,(j) as those who have consulted old *placita* can testify. The custom would have been less perplexing had it been uniform, since the identity of the bearers would be as well shown by names always in the language of the records as by their real names: but it is found that the clerks either translated them into Latin or French, or retained them in the vernacular at their pleasure, and without being guided by any fixed rule. Thus, "Thomas de la Guttere" of one year appears as "Thomas atte Strete" in the next return.(k) This is also an example of the translation not being made as was to be expected merely by the substitution of a termination suitable to the language used. Indeed most frequently the names are changed throughout, by a translation founded on some derivation or

(f) Chandler's Life, p. 13.

(g) 1 Palg. Par. Writs, 409; Bigland's Observations on Parish Registers, Archæologia, vol. 18, p. 167.

(h) See Beltz's Review.

(i) 1 Palg. Parl. Writs, 409.

(j) Co. Lit. 3 a. He says, "the lawyer never translates surnames."

(k) 1 Palg. Parl. Writs, 409.

meaning, which struck the fancy of the writer. The following specimens of the disguises under which many familiar names may be traced, and from which their difference is often so great [ \*460 ] that, as \*Camden (from whom I take most of them) remarks, "they will scantily seem to have been the same" (l)—Astley, *D'Estlega*; Boys, *De Bosco*; Beauchamp, *De Bello Campo*; Bowes, *De Arcubus*; Crevecure, *De Crepito Corde*; Cecil, *Sifiltus*; Devereux, *De Ebroicis*; Hussey, *De Hosato* and *Hosatus*; Love, *Lupus*; Lovell, *Lupellus*; Lisle, *De Insula*; Montjoy, *De Mont Jovis*; Mortimer, *De Mortuo Mari*; Pierpont, *De Petrà Ponte*; Nevill, *De Novâ Villâ*; Newmarch, *De Novo Mercatu*; Roche, *De Rupe*; Savoy, *De Sabaudia*; Strange, *Extraneus*; De la Zouch, *De Stipite Sicco*. Some Christian names are also considerably varied by translation, and one name in one language occasionally serves, and may legally be used, (m) for either of two in another, as *Jacobus* for James or Jacob.

Sometimes a difficulty arises from the fact of the same person appearing to bear different Christian names at different times. Thus, in the Camoys Peerage case it was necessary to show that Elizabeth Lewknor, an ancestress of the claimant, was the same person who was at other times called Isabella Lewknor. Evidence was produced to show that, in the reigns of Edward II. and Edward III. the names of Elizabeth and Isabella or Isabeau were frequently applied to the same person in inquisitions *post mortem*. (n)

A very common cause of confusion, extending over both Christian and surname, is the recurrence of the same Christian name in the same family. It is remarked in old records, that "the additions of *senior* and *junior*, as well as the local descriptions, are so often omitted as to render it impossible to distinguish between the various branches." With respect to a father and son who were contemporaries, the rule in legal proceedings probably influenced the practice in other writings, and is thus laid down: if a father have the same name and addition with his son, the writ against the son is abatable, unless there is the further addition of *puise*, (or its equivalent *junior* or *the younger*;) but if the father be \*defendant there is [ \*461 ] no need of the addition of *eigne*. If the additions were different then *puise* was unnecessary to the son's description. (p)

When two appearances of a name alleged to designate the same person are distant from each other, further evidence may be required to prove that the same individual was intended: and if the interval exceed the duration of human life, it will of course be fatal to the identity. In the claim to the De Roos Barony, the committee required evidence that William De Roos de Hamelake summoned, 1 Hen. 5, was identical with a person so named who had been summoned 20 Rich. 2, and the proof was supplied by intermediate summonses in the reign of Hen. 4. (q)

The effect of time as a characteristic in fixing identity is noticed by

(l) *Reains*, p. 191.

(m) 2 Roll. Ab. 135, 136; 3 Keb. 278.

(n) See 6 Cl. & Fin. 800; Evidence of Mr. Hardy, printed Min. of Ev. p. 351.

(o) 1 Palg. Parl. Writs, 409.

(p) Salk. 7, pl. 16; 2 Hawk. P. C. 261, c. 23. *Sweeting v. Fowler*, 1 Stark. 106, (3 E. C. L. E.)

(q) Min. Ev. 1804, p. 33.

Sir T. Plumer, M. R., in the case of the Marquis of Cholmondeley v. Lord Clinton. The character (that of right heir of S. R.) he observes, may belong equally to several persons in succession : time, therefore, or some other characteristic circumstance is to be added when any one is to be identified. As it stands, it is a generic not a specific description ; it wants all that is to give it particularity and identity ; the *differentia*, the *accidens* (as the dialecticians term it), name, date, or circumstance, to denote what right heir is meant. Without such addition the description will equally fit every right heir, but characterizes no one in particular. It will apply with equal propriety to Lord Clinton as to Lord Oxford ; for each, at a different time, was solely, exclusively, and correctly, the right heir of S. R. (r)

The characteristics which next after the name deserve attention are those comprised in the description or addition. The common law in no case required any other description of a person than by his Christian name and surname, unless he were of the degree of a knight or some higher dignity, when the name of dignity was necessary as being a mark of distinction imposed by public authority. (s) But in [ \*462 ] the time of Hen. 5, it is said to have been \*perceived that the Christian and surname were not sufficient denominations, and did not sufficiently avoid the confusion that might happen by the mistake of persons ; and the statute of additions (t) was therefore passed, enacting in certain proceedings where execution was awarded against the defendants, that " additions should be made for their estate, or degree, or mystery, and of the towns, or hamlets, or places and counties in which they were or be, or in which they be and were conversant." (u)

This statute must have extended, though there is evidence against the opinion that it introduced, the practice of adding descriptions in deeds and other instruments. Spelman and Barrington have shown that Fuller is in error when he asserts that additions were not used except in law process, until the end of the reign of Hen. 6 ; (v) and the former notices some who wrote themselves *armigeros* in the time of Ed. 3. (w)

The addition, it may be observed, is entitled to more weight in evidence, either for or against identity, in proportion to the antiquity of the facts. The frequency of changes in rank, occupation, and residence, having increased with the commercial advancement of the country, discrepancies in such characteristics are therefore, more easily overcome as we approximate to modern times, when fluctuations in the fortunes of persons and families are continually found to occur. Those additions especially which are called names of worship, as *esquire*, *gentleman*, and *yeoman*, have been long loosely applied ; (x) and a discrepancy in them, deserves little consideration as evidence against the identity of persons, (y) and, of course, much less when adduced to show a difference of family.

In the Chandos case, a deed was put in evidence, in which Edward

(r) 2 Jac. & W. 88.

(s) 2 Inst. 665 ; 5 Bac. Ab. 594.

(t) 1 H. 5, c. 5.

(u) 2 Inst. 670. And see Bro. Ab. Addition.

(v) English Worthies. (w) Spelman on Ancient Deeds ; Barrington on the Statutes.

(x) 2 Inst. 666 ; Fortescue, Rep. 354. See Barrington on 34 Ed. 3, c. 22.

(y) On its legal effect, see the cases on the plea of *non tiel person*, 16 Vin. Ab. 15.

Bridges was described as "yeoman," whilst in the register of Maidstone, Robert, who, by the claimant's case, was Edward's \*father, was styled "esquire." Lord Eldon observed, [ \*463 ] "If this were all the difficulty to be surmounted by the claimant, I cannot say it would create much hesitation in my mind. If these terms of 'esquire' and 'yeoman,' which we know by long usage have been so arbitrarily applied according to the habits or property, or pretensions of individuals, or the caprice or ignorance of those who assigned them, were to be taken as grounds on which to decide the rights of claimants, whether to estates or dignities, your Lordships must perceive upon how precarious a ground the just rights of many in the country must stand, if at all called in question. In this case, the rank in life of the small heiress with whom Edward, himself having no property, intermarried, has been assigned as accounting for the station in which he thus appears to have been placed." (z)

In reference to this case, it was stated to illustrate the weakness of the argument of non-identity of family from a difference of condition in life, that one of the Lords Willoughby of Parham, was a common soldier when the title fell to him, and another a cutler. (a)

But where the person, whose identity is the subject of dispute, is shown to have held a different station in life from that of the person with whom he is sought to be identified, the evidence will be entitled to weight in disproving the identity. Thus, in the case of Rutherford v. Maule, it was attempted to identify one Robert Rutherford, of Trenton, in America, with a Robert Rutherford, the son of a wheelwright, at Lurgan in Ireland, one of whose sons was a wheelwright, and another a whitesmith: but amongst other grounds for decreeing against the identity, Sir J. Nichol relied on the fact, that the intestate in the cause was proved to have stated, "that she understood her father's (R. Rutherford of Trenton) family were not wheelwrights and smiths, but persons of some consideration." (b)

But it may be observed, by the way, that there are certain \*characteristics the effect of origin, or impressed in [ \*464 ] youth, which a change of fortune will not easily efface. A person who appears in middle life in low circumstances, may yet be identified as the child of an opulent family, but it is scarcely credible that the education which he must have received should ever leave him unable to write his name. In Hood v. Lady Beauchamp, it was shewn that Elizabeth Jennens, from whom the plaintiffs were undoubtedly descended was a markswoman, and this materially tended to disprove her alleged identity with Elizabeth, the daughter of Humphrey Jennens, a wealthy iron-master. The suggestion, unsupported by proof, that she might have been paralytic when she made her mark, which she did when of the middle age, was treated by the Vice-Chancellor as being a bare probability undeserving of consideration. (c)

In weighing the sufficiency of evidence of identity, the compara-

(z) Speech, cited ante, p. 93.

(a) Beltz's Review of the Chandos case, p. 230, where there are some judicious observations on this subject.

(b) 4 Hagg. 239.

(c) MS. Vice Chancellor, Easter Term, 1836.



tive frequency of the name, and the population of the place of residence are, of course, material circumstances.(d)

Civilians held, that unless the name was frequent, further evidence was unnecessary, for that plurality was to be proved and not presumed. Abbott, J., made a similar remark ;(e) and Lord Mansfield's observation coincides, that loose evidence of identity becomes cogent when it is not answered.(f) But where it is not the province of any party to answer it, as in conveyancing, in some proceedings in equity, and in claims of peerage, in the absence of positive evidence, a cumulation of points of agreement would seem to be necessary. I have not met with the mention of any number as sufficient in our law, but the commentators on the civil law do not require, even in common names, the addition of more than two concurrent characteristics.(g) And from the following cases, it will appear that in our courts, one joined to the name, will often prevail.

A very usual mode of shewing identity, is by proving a conformity [ \*465 ] \*of residence, in addition to that of name ;(h) and where the place of residence is small, and the name not of the commonest, the evidence is generally deemed sufficient. At Nisi Prius, to prove the death of John Ingram, the register of burial of a person of that name, at Castleton Oxfordshire, was put in evidence, and his identity with the given John Ingram was established by the will of the latter, dated shortly before the time of the burial, in which he mentioned his house at Castleton. The will of a party is also of frequent use in identifying him by the mention of his nearest relatives, his property, and other particulars.(i)

On the same ground of conformity in respect of time, Lord Kenyon held a person identified sufficiently with one so named in a baptismal register, by the evidence of witnesses that the party was born about the date of the baptism.(j) On the other hand, an incongruity proved in the time of birth, death, or any other inseparable characteristic, would be fatal to the identity. Such evidence may be attacked by throwing discredit upon it ; but if true, there must have been a plurality of persons.

In the case of the Braye Barony, it seems to have been thought sufficient to identify a man, described in an ancient record, as of B. a country parish, with a person of that name in the pedigree, to shew *aliunde* that the latter held land in B.(k)

But in *Beer v. Ward*, when to prove the death and identity of a servant in the Cotton family, so as to let in his deposition upon a commission of lunacy, in which he was described as of Etwall in Derbyshire, the register of burial of a person so named, was put in evidence from Etwall, Dallas, C. J., held the evidence of identity insufficient, but it was ultimately proved by a witness, who deposed

(d) See Real Property Report respecting common names.

(e) 1 B. & Ald. 187.

(f) 4 Doug. 33, (26 E. C. L. R.)

(g) Bartolus on Dig. 35, 1, 17 ; Cod. 6, 22 ; Baldus and Paulus de Castro, *ibid.* ; Decius Cons. 13. n. 9.

(h) Residence alone, even in the house of the party, is, without proof of name, insufficient evidence of identity. *Corfield v. Parsons*, 1 Cr. & Mee. 730.

(i) *Assn. ex relatione*, Midland Circuit, Summer Assizes, 1829.

(j) *Loader v. Barry*, 1 Esp. 784, and see 2 Jac. & Walk. 88.

(k) *Mim. Ev.* 1806, p. 39.

to the time when the servant died, which corresponded with the register, and that he had lived in the family.(l)

\*In cases which have been alluded to where a party's [ \*466 ] title to sue or convey depends upon his filiation, and evidence of his parents' identity becomes requisite, it is usually considered sufficient, in addition to the natal or baptismal register, to shew that the given parents resided in the parish about the time of the child's birth or baptism.

Sometimes when the parent was in a public employment, which required frequent changes of residence, the necessary proof of this may be derived from the records of the department. In a case within my own observation, the children of an exciseman were entitled, in their filial character as residuary legatees, to a fund in court, and having been born in different parts of the kingdom, their relationship to a person of the name, was established by the baptismal registers of the different parishes, and their father's identity by the books of the Excise Office in London, shewing that he was stationed at the respective places at the respective times of the children's birth.

It is not unfrequently important in genealogical inquiries to establish merely the existence of a certain person at a certain period, and any circumstances of description and residence, &c. which may show a conformity or discrepancy with reference to the case which is set up.

In the claim to the Barony of Zouch of Haryngworth, in order to prove the existence of a person, a widow, and her residence at Hanbury in the year 1649, the book of rates and loans of the parish of Hanbury was produced, which contained an entry of the payment of her subscription to a parish loan in that year.(m)

Identity will be well proved when it can be shown that the person named in the proofs stood in the same relationship to others as the person so named in the case. It was necessary in tracing a pedigree at Nisi Prius to prove the marriage of Catharine Milcah. A register was produced of the marriage of a woman of that name to Michael Woodhul; and the identity was proved by \*means of a [ \*467 ] tombstone to the memory of Catherine Woodhul, stating [ \*467 ] relationships of the deceased, which were those of the Catherine Milcah of the pedigree.(n) So in the Huntingdon case, to prove the failure of issue of Theophilus Hastings, the will of a person of that name was put in evidence, and the Attorney General reported that the testator was identified by a devise to his niece, who was *aliunde* shown to have stood in that relationship to the Theophilus of the pedigree.(o)

Where a party of the same name is shown to have sustained also the same character (e. g. personal representative of A. B.) as the person in the case, the conformity in both particulars may, unopposed, prevail as evidence of identity. Thus upon a plea of *plene administravit* by the defendant Charles Lyon, administrator of Mary Lyon, the plaintiff in order to show assets, produced a copy of a bill and answer in Chancery, the latter purporting to be an answer by a

(l) Printed Report, p. 49.

(n) Anon. Midland Circuit, 1829, *ex relations*.

(m) Min. Ev. 162.

(o) Bell's Hunt. Post. 342.

Charles Lyon, administrator of Mary Lyon, and the agreement in name and character was held sufficient *prima facie* evidence of identity.(p)

The possession by A. B. of an instrument in which mention is made of A. B. is held by civilians to be good evidence of the identity.(q) And Dallas, C. J., received a certified extract from a register of marriage, signed by the clergyman, and proved to have been long preserved in the family, as evidence of the identity of a couple of ancestors with the parties bearing the same name in the register, it being fair to presume that this identity was the reason of its preservation.(r)

The handwriting, when well proved, is one of the best means of identification; and even in criminal cases identity has been held to be sufficiently established by this evidence alone.(s)

It was to facilitate the proof of identity upon trials of perjury that [ \*468 ] \*an order was made in Chancery, requiring answers to be signed.(t) And the identity is thus properly established by any person who can speak to the signature.(u)

It has recently been held, after considerable difference of practice and opinion, that proving the handwriting of a subscribing witness did not dispense with the necessity of some evidence of the identity of the party executing the instrument.(v) But in this case very slight evidence of identity will suffice.(w)

There was considerable discussion in *Hood v. Lady Beaucamp* upon the admissibility of hearsay evidence of the characteristics by which the identity of persons in a pedigree might be established.(x) The question being whether A. B., an ancestor of the declarant C., was the same person as A. B., a blacksmith, who had resided at X., a declaration by C. that his ancestor was a blacksmith, and that he resided at X., was tendered. Sir L. Shadwell, V. C., admitted this evidence, and also declarations tendered for a similar purpose, as to the religion of one of the members of the declarant's family. His Honour cannot be considered by this decision to have ruled that hearsay evidence of identity is admissible.(y) It is observable that there would have been no question if the declaration had been that A. B. was the declarant's grandfather. Now the name is merely one descriptive sign, and the substitution or addition of another, as occupation, or residence, cannot alter the nature of the evidence; nor can the order in which the parts of a declaration are proved affect its admissibility. The declaration would seem to be equally receivable,

(p) *Hennell v. Lyon*, 1 B. & Ald. 182.

(q) *Baldus*, In. C. *ex literis*, n. 6.

(r) *Beer v. Ward*, 1st issue, p. 193.

(s) *Rex v. Morris*, 2 Burr. 1189; *Rex v. Benson*, 2 Camp. 538; *Dartnall v. Howard*, Ry. & M. N. P. C. 169, (21 E. C. L. R.) And see in civil cases, *Birt v. Barlow*, 1 Doug. 174; *Scott v. Lewis*, 7 Carr. & P. 349, (32 E. C. L. R.) *Bulkeley v. Butler*, 2 B. & C. 441, (9 E. C. L. R.); 1 Moo. & Mal. 79, 176, 206, (22 E. C. L. R.)

(t) *Rex v. Morris*, 2 Burr. 1189.

(u) *Rex v. Benson*, 2 Campb. 508; *Dartnall v. Howard*, Ry. & M. 169, (21 E. C. L. R.); *Scott v. Lewis*, 7 Carr. & P. 349, (32 E. C. L. R.)

(v) *Whitlocke v. Musgrove*, 1 Cr. & M. 521. See cases there cited, and 1 Phill. Evid. 661 n., 8th ed.

(w) *Nelson v. Whittall*, 1 B. & Ald. 19; *Gough v. Cecil*, cited Selw. N. P. 516, n.

(x) MS. V. C. Easter Term, 1836.

(y) The contrary was decided in an old case, *Lord Ferrers v. Shirley*, Fitzg. 195.

whether in the form that A. B., of X., blacksmith, was the declarant's grandfather, or that A. B. was his grandfather, that he was a blacksmith, and that he resided at X.(z) It is, however, apprehended that if there is no genealogical matter asserted, the simple hearsay declaration of the trade or residence of another, though *aliunde* shown to be a relative of the declarant, would not be received.

## \*PART III.

[ \*469 ]

## OF THE SOURCES OF EVIDENCE OF SUCCESSION.

THE order in which it is proposed to examine the sources of this evidence is that in which they are naturally resorted to in practice, commencing with written evidence taken under public authority, as parish registers and registers under the recent General Registration Act—passing to dissenters' registers, and other documents of a general or public character, but of inferior authority—ascending to the more ancient public records, in which genealogical evidence is contained—and lastly, treating of hearsay evidence on this subject, the principles and limitations which govern its admission, and the various forms under which it may be found.

## CHAPTER I.

## OF PARISH AND GENERAL REGISTERS.

UNTIL the recent General Registration Act, 6 & 7 Wm. 4, c. 86, parish registers were the most copious, and, notwithstanding many gross defects, the best source of genealogical evidence which could be resorted to. The system of registration established by that act does not wholly supersede the use of these records. Many years must elapse before the superior character of the new registers can produce any sensible effect in genealogical inquiries; and in all cases where a pedigree is to be traced back beyond the date of that statute, the importance of parish registers will be undiminished.

\*Writers are not agreed as to the exact date of the first establishment of parish registers in England.(a) The [ \*470 ]

(a) See *Rutherford v. Maule*, 4 Hag. 239.

(a) Parish registers were in use on the continent before they were instituted in this country, but the period of their origin is uncertain. Vellutello, a commentator on Petrarch, in the early part of the sixteenth century, relates that, in prosecuting some researches respecting the history of Laura, he found, at Cabrières, a village in Avignon, a register, dated 1314, of the baptism of a Laura, whom he believed to be the object of his search; and he says the practice was followed in many other places. In Spain parish registers were instituted in 1497, by Cardinal Ximenes, for the purpose of putting an end to the frequency of divorces, by reason of the spiritual relationship of parties through their godfathers and godmothers, or their sponsorship of the same child. He ordained that in every parish, a register should be kept, in which should be written the names of those who were baptized,

more general opinion seems to be that it should be referred to the 30 Henry 8, A. D. 1538. The earliest known authoritative provision on the subject is an injunction of Thomas Cromwell, Lord Privy Seal and Vicar General to the King, issued in September of that year. It directed a book and coffer, with two locks, to be provided in each parish, and ordered the parson, weekly, before the wardens, to write and record in the book all the weddings, christenings, and burials made the week before, and subjected him for neglect, to a fine of 3s. 4d., to be employed in the repairs of the church.(b)

There is however some reason for believing that the institution of parish registers was agitated (if indeed some order was not actually made respecting them,) two years before the issuing of this injunction by Cromwell. In the year 1536, during an insurrection in Yorkshire, we are told by Speed,(c) that the Romish priests, in order "the more to draw forth the rude multitude, which were forward enough of themselves, set forth in writing these slanderous untruths against the King." The first which he mentions is "that no infant shall receive the blessed Sacrament of Baptism, bott onlesse an trybett to be payd to the King." Another historian(d) also charges them with having told the [ \*471 ] people, "that they should be forced to pay for christenings, marriages, and burials (orders having been given for keeping registers thereof.)" The assertion that orders had been given may be a mere supposition of the historian; but it is plain that the intention to establish registers had attained some notoriety, and perhaps some preliminary order had been made respecting them.

The object of Cromwell in directing the establishment of parish registers is not clearly ascertained. He has been represented as having instituted them from motives of self interest, and their utility has been thought to have been a subsequent discovery. As Vicar General to the King, he was entitled to have the wills of all persons worth above 200*l.* proved in his court, and it is said, that it therefore served his purpose to set on foot the keeping of parish registers.(e) But this reasoning is inconclusive, and unsupported by the authority of any contemporary writer, and without attributing to him such motives, or adopting the conjecture of Holloway, that he was indebted to the heralds(f) for the idea of keeping such registers, perhaps sufficient reason for the institution of them may be found in his own history and the events of the times. In his youth, Cromwell had travelled for several years on the continent, and among other countries, had visited France and Spain. There is thus fair ground for presuming that he became acquainted with the practice of keeping parish registers, which was already established in those countries; and no event could be more likely to call for the introduction of such a system into England, than the dissolution of the monasteries, and conse-

of their fathers, mothers, godfathers, godmothers, and witnesses of the baptism, together with the time when the ceremony was performed.—*Marsolier Histoire du Ministère du Cardinal Ximenes*, tom. 1, p. 263.

(b) It appears that in some existing registers, there are entries bearing dates prior to 1538, but the probability is that they were made after that time. See Rep. on Par. Reg. Min. of Ev., p. 13.

(c) Speed's Hist. England, vol. 3, p. 140.

(d) *Enc. Abr. tit. Evidence (F.)*, 4th ed. 682, 3. Gild. 76.

(f) *Inq. Henckery*, p. 187.

quent dispersion of the monks, who had been the sole registrars and and genealogists of the preceding ages.(g) This supposition is strengthened by the circumstance that Cromwell was appointed visitor to the monasteries in 1535, and became an active promoter of the measures which led to the dissolution of the lesser ones in the following year, which was the very time, when it appears, from the complaints of the Yorkshire rebels, that parochial [ \*472 ] registration was first threatened.

But whatever was the cause of their origin, the utility of parish registers soon became apparent, and the keeping of them was further enforced by one of the injunctions of Edward 6, A. D. 1547, which is in nearly the same terms as that of Cromwell.(h) And in the same year one of the articles of Cranmer, to be inquired of at visitations was, "whether they have one book or register safely kept, wherein they write the day of every wedding, christening, or burying."(i)

The change in ecclesiastical matters produced by the re-establishment of Popery, under Mary, affected parish registers but little. The statutes of the national synod, held under Cardinal Pole, in 1555, and the articles touching the clergy of 1557, point out the due keeping of the register as one of the subjects of inquiry at visitations.(j) The only alteration made was, a direction that the additional particulars of the names of the godfather and godmother at baptisms should be inserted, which adoption of the ordinance of Cardinal Ximenes, on the same subject, is remarkable, when viewed in connection with the change in religion.

In the first year of Elizabeth, 1559, among the injunctions which were issued by the queen is one respecting the keeping of parish registers, which is expressed in almost the precise terms of those of Cromwell and Edward VI.(k) And the due keeping of the register is, in the same year, one of the articles to be inquired of at visitations.(l) In 1564, one of the protestations appointed to be made and subscribed by ministers, previously to induction, was, "I shall keep the register book according to the Queen's Majesties injunctions."(m)

The slow progress which has been made towards making parish registers an efficient national institution will seem more [ \*473 ] surprising when it is considered that, at so early a period after their commencement, as the 5th of Elizabeth, the attention of parliament was turned to their regulation and improvement. On the 9th March, 1562-3, a bill was read a first time in the House of Commons,(n) intituled "A bill to authorize every archbishop and bishop to erect one office of registership of all the church books in due order, to be kept in every diocese."(o) The bill, after reciting the benefits

(g) A solitary instance of the connexion between monastic and parochial registers is given in Noble's Hist. Coll. Arm. App., p. 20. In the parish register of Baddesley Clinton, are copied out from a neighbouring religious foundation some very choice circumstances.

(h) Sparrow's Coll. p. 4. Godolph. 45.

(i) Sparrow, p. 27.

(j) Archæologia, vol. 8, p. 67. Fox Acta, & Mon. ad. ann.

(k) Sparrow, p. 70.

(l) Ibid. p. 178.

(m) Ibid. 128. Gibb. 204.

(n) Journals, vol. 1, p. 68.

(o) This bill was drawn by Thos. Bowsey, and presented to Archbishop Parker for his approbation. It is not mentioned by Burnet, Collier, or D'Ewes, nor by Strype, either in his annals or his life of Parker. Nicholas has it in his Illustrations De Reg. Par. p. 6, from Miscell. 2, p. 365, in Benet Coll. Library, Cambridge.

which had arisen from the registration under the former injunctions, on the trial of titles, to persons having need to know their own ages, "and upon an infinite number of other occasions," provides for the establishment in each diocese of an office of registership to survey, preserve, and register the church books, as well those already in existence as those which should thereafter be sent in from year to year.

This bill, for some reason which has not transpired, was abandoned; but in 1590, another plan was set on foot for a general register of all the christenings, marriages, and burials within her majesty's realm of England and Wales. Certain reasons for this are set forth by Strype,<sup>(p)</sup> addressed to Lord Treasurer Burleigh, who is stated to have sent a patent to the archbishop of Canterbury for his judgment.<sup>(q)</sup> The project however was allowed to drop; and the next regulation respecting parish registers was the constitution of 1597,<sup>(r)</sup> made by the archbishop, bishops, and clergy of the province of Canterbury, and approved of by the queen, under the great seal of England, to be observed in both provinces. It was ordained that parchment books should be purchased at the expense of each parish, in which were to be written the names of those who had been baptized, married, or buried during the reign of the then queen, taken from the old paper books, as well as all future baptisms, marriages, and burials. The [ \*474 ] transcripts of the old books were directed to be examined \*with the originals, and the correctness of the entries certified by the subscription of the clergyman and churchwardens, at the bottom of each page. Then follows the first provision respecting the transmission of duplicates to the registry of the bishop. Exact copies of the registers were ordered to be annually transmitted, within a month after Easter, by the churchwardens to the registrar of the diocesan, which were to be received by him without fee, and faithfully preserved in the episcopal archives.

This constitution is confirmed in all material points by the 70th of the ecclesiastical canons of 1603; which moreover directs, that in the parchment book to be provided, there shall be written the day and year of every christening, wedding, and burial which shall have been in that parish, since the time that the law was first made in that behalf, so far as the ancient books thereof can be procured, but especially since the beginning of the reign of the late Queen. Particular directions are also given respecting the custody of the register in "a sure coffer with three locks and keys," whereof one was to be in custody of the minister, and the other two with the churchwardens severally. The canon directs entries of every baptism, marriage, and burial which should take place during the week, to be made in the register, by the minister, in the presence of the churchwardens, on every Sabbath day; and requires the minister and churchwardens to sign their names at the bottom of every page. The churchwardens are further required annually to transmit to the registry of the bishop of the diocese, a copy of the entries for the past year; and the bishop is empowered to proceed as for contempt against any party neglecting to comply with the injunctions of the canon.

In the year 1644, the same ordinance,<sup>(s)</sup> which substituted "the

(p) *Annals*, vol. 4, p. 45.

(r) *Sparrow*, p. 257.

(q) *Nichols III. De Reg. Par.*

(s) *Scobell*, 75.

directory of public worship" for the book of common prayer, contains directions for the registration of marriages, baptisms, and burials, with the additional particulars of the times of birth and death respectively in the latter cases. This ordinance left the duty of registration where it found it, in the hands of the clergy and parochial authorities; but that which followed, in \*1653,(t) established a new system. [ \*475 ] By that ordinance, which directs marriages to be solemnized before a justice of the peace, particular directions are given for the appointment, in each parish, of an officer, whose duty it should be to register all marriages, *births*, and burials, which should take place in the parish, and under this ordinance no marriage could take place, until notice had been given to the register of the intention to celebrate it.

At the Restoration, although some acts(u) were passed for declaring the validity of marriages which had been solemnized under the last mentioned ordinance, there was no express legislative interference with the keeping of parish registers, but all the ordinances of the Commonwealth being annulled, this duty fell again to the parochial clergy.

The first act of parliament which relates to parish registers is the 30 Car. 2, c. 3,(v) intituled "An act for burying in Woollen," but this only provides for a registration of burials.

By the 6 & 7 W. 3, c. 6, amended by 7 & 8 Wm. 3, c. 35, the institution was made more effective, for the purpose of facilitating the collection of certain duties thereby imposed upon marriages, *births*, and burials. By these acts all persons in holy orders were required, under a penalty of 100*l.*, to register all *births*, marriages, and burials, which should take place in their respective parishes or precincts. These two last mentioned acts were, by the 8 & 9 Wm. 3, c. 20, continued to the 1st of August, 1706, and by the 9 & 10 Wm. 3, c. 35, some further particulars were required to be entered in the register, for the neglect of which a penalty of 20*l.* was imposed. The penalties, however, for not keeping the registers properly, were remitted by stat. 4 Anne, c. 12, s. 10, in all cases where the duties, for securing which the registers were established, should have been actually paid. We find no further enactment respecting parish registers until the 26 of Geo. 2, c. 33, commonly called the Marriage Act, which gives much more minute directions as to the system of \*registration to be pursued under that act, than any former injunction, [ \*476 ] ordinance, or statute had given. It even prescribes the form in which entries are to be severally made in the register books. There are, however, two important omissions observable in this act. There is no penalty provided for not keeping the register duly, consequently there were no means of enforcing due attention to registration, and no provision is made for sending transcripts of the registers to the registry of the diocesan. Some provision for correcting the effect of this statute having become necessary, in consequence of the decision of the Court of King's Bench, in the case of *King v. Northfield*,(w) the sta-

(t) Seebell, 236.

(u) 12 Car. 2, c. 33, confirmed by 13 Car. 2, c. 11.

(v) Repealed by 54 Geo. 3, c. 106.

(w) 2 Dougl. 659, ante, p. 290.



tutes 21 Geo. 3, c. 53, and 46 Geo. 3, c. 127, were successively passed, for rendering valid certain marriages solemnized in certain churches, and public chapels, in which banns had not usually been published before, or at the passing of the 26 Geo. 2, c. 33. By the latter of these acts, section 3, it is enacted, that registers of such marriages shall have the same validity as evidence, and be liable to the same objections, as registers of marriages solemnized in churches within the 26 Geo. 2, c. 33. The 4th section provides for depositing the registers of such chapels in the parish church, and for transmitting copies annually to the bishop's registry. By the 23 Geo. 3, c. 67, a stamp duty was imposed upon the entry of all marriages, burials, births, or christenings, with certain exceptions; and the operation of this act was, by the 25 Geo. 3, c. 75, extended to the registers of all dissenters. By the 34 Geo. 3, c. 11, however, the duties imposed by the two last mentioned acts are directed to cease on the 1st of October, 1794. But this act was not to affect the validity of any register. There was no provision respecting marriages in chapels erected since 1808, until the late marriage act, the 4 Geo. 4, c. 76, by which bishops are empowered to license chapels for the publication of banns, and the solemnization, and registration of marriages, upon the same footing as parish churches.

The 52 Geo. 3, c. 146, passed expressly for the purpose of better regulating parochial registers, gives very particular directions for the [ \*477 ] manner and form in which all such registers were to \*be kept, and the time within which each entry was to be made after the performance of the ceremony registered. There is no change made in the person on whom the duty of making the entries was fixed, which still continued to be the officiating minister; but a provision is contained for the entry of baptisms, or burials, performed elsewhere than in the parish church; and the preservation of the registers, and transmission of transcripts to the diocesan registry are carefully provided for. There is a proviso in the act that nothing therein contained should extend to repeal any provision in the Marriage Act, 26 Geo. 2, c. 33, and the form of entering marriages in the registers, as set forth in a schedule to the act, is precisely the same as that contained in the Marriage Act. There are two striking incongruities in this act. The first is, that though registers of *births* are included in the title, the act itself does not contain any provision whatever upon that subject. The second is less innocent; for while the only penalty awarded by the act is that of fourteen years' transportation for falsifying any register, the 18th section directs that all penalties therein awarded, shall be divided between *the informer and the poor of the parish*.

The Marriage Act, 4 Geo. 4, c. 76, repeals the 26 Geo. 2, c. 33, but re-enacts the regulations respecting the registration of marriages, substituting transportation for life in place of death, as a punishment for forgery or destruction of the register.

The act which now regulates registration is the 6 & 7 Wm. 4, c. 86, intituled "An act for registering births, deaths, and marriages in England," explained and amended by 1 Vict. c. 22. The most material provisions of the former act will be here shortly noticed, and both acts will be given at large in the Appendix. One of the most important changes introduced by this act, is the providing a system

of registration independent of that committed to the care of the parochial clergy, and to be carried into effect by officers to be appointed under the act. The 7th section provides for the division of the country into districts, and the appointment in each district of registrars, and superintendent registrars. Section 9 provides for the establishment of register offices, to be under the care of the superintendent registrars. Section 14 directs boxes for the keeping of the register \*books to be provided. By section 16, the registrars are required to live in the district for which they are appointed. [ \*478 ] Section 17 directs register books to be provided. Section 18 requires the registrar to register all births and deaths which shall happen within his district; notice of which events is, by section 19, directed to be given to the registrar by the persons therein pointed out. Section 20 requires the parents, or occupiers of houses where births take place to give the particulars of such births to the registrar. Section 21 provides for the registration of births which may take place at sea. Section 22 limits the time to be allowed for registration to forty-two days from the birth, except in some cases; while section 23 prohibits the registration of births in any case (except in that of children born at sea,) after six months from the births. Section 24 permits the name given in baptism to be registered within six months after the registration of the birth. Sections 25, 26, 27, 28, provide for the registration of deaths, of which information is directed to be given in the same way as of births. Section 30 directs marriage register books to be provided, which section 31 requires to be kept in duplicate. One copy when filled is, by section 33, directed to be kept by the superintendent registrar, and the other by the person having the charge of making the register. Section 32 directs that certified copies of the registers of births and deaths shall be sent quarterly, as also the register books themselves, when filled, to the superintendent registrar, who, by section 34, is required to send certified copies of the registers to the general register office.(x) These are the most important sections of the new Registry Act, as affecting the mode and subject of registration, by which it will be seen that two important changes are effected. First, births and deaths are registered, instead of merely baptisms and burials; and, secondly, a system of registration is provided, which being independent of the ceremonials of the Church of England, is open to Jews, Quakers, and Dissenters of all denominations, who formerly laboured under the practical disability, of not being able to avail themselves of the registers heretofore in use, without submitting to ceremonies to which they conscientiously objected.

\*It has been thought of importance to enter into a minute and careful detail of all the changes which have occurred [ \*479 ] in the general history of parish registers, not only on account of the light which is thereby thrown upon their present state, but also because the admissibility and value as evidence of the registers of different periods, must necessarily be affected by the regulations

(x) Under the system of indexing adopted at this office, with no indication but the surname of the party, and probable period of the event sought for, the search may be accomplished in a few minutes. The method is explained in the first report of the Reg. Gen. p. 9.

ecclesiastical or Parliamentary, which were for the time being in force respecting them.

This latter subject will be afterwards considered; but the elucidation which the present state of parish registers receives from the changes in their history, is the more valuable because it is feared that no other general information upon the subject is to be obtained. By Mr. Rose's act,<sup>(y)</sup> the minister of every parish was directed to transmit, before the 1st of June, 1813, to the registrar of his diocese, a list of the register books then extant in his parish, stating the periods at which they respectively commenced and terminated, the periods, if any, for which they were deficient, and the places where they were deposited. This order was not, however, enforced by any penalties, and compliance with it was therefore exceedingly partial. In the diocese of London only four or five parishes are said to have sent lists; but wherever it has been attended to, the registrar of the diocese is in possession of information upon the state of the registers of each parish, which would be of the greatest service to those engaged in genealogical researches in different parts of the kingdom, and which it is highly desirable should be published for their use. In the absence of a more perfect guide, many particulars upon the state of parish registers from 1700 to 1800 will be found in the population abstract of 1801. Under the head of each parish there is generally a note of the state of its register (if it be defective during that period,) which expresses the time when the deficiencies commence and terminate, and in what class of registers they occur. According to this abstract, the registers of many hundreds of parishes are defective for different portions of the last century, some of them for spaces as great as fifty, sixty, or even upwards of eighty years.<sup>(z)</sup>

[ \*480 ] \*It has been observed that parish registers were heretofore generally considered as affording the best evidence in questions of pedigree; but it is not every document which purports to be such a record, that will be available in proof of what may be recorded in it, and it becomes of importance to consider the principles upon which their admissibility and superior value in evidence depends, and to inquire when and under what circumstances they may lose that admissibility or superiority. These documents then derive their weight in evidence only from the fact of their having been made and preserved under the sanction of enactments, either ecclesiastical or legislative, according as the canons, injunctions, ordinances, or acts of Parliament, which have been before briefly recounted were in force respecting them. Sir L. Kenyon, M. R., observed, in the case of *Huet v. Le Mesurier*,<sup>(a)</sup> "that credit is given by courts of justice to registers of baptism in this country, as being *under the ecclesiastical jurisdiction*," referring thereby to the authority under which registers had been originally, and were even then (anno 1780) chiefly kept. Besides, as an entry in a parish register, is but the declaration of the minister, that he performed a certain ceremony, at a certain time, upon a person, whose identity as the person described is, however, a

(y) 53 Geo. 3, c. 146.

(z) E. g. Easthake and Westhake Notts. defective from 1700 to 1780, p. 228; and Balderston, in Lancashire, from 1700 to 1786, p. 145.

(a) 1 Cox, 275.

fact often not within the knowledge of such minister, it is difficult to assign any sufficient reason, for conceding greater weight to such documents, than would be accorded to the written declaration of any other indifferent party, unless it be upon the ground, that the register is made by a person acting officially, in the execution of duties imposed upon him by law. Accordingly, it will be found, on examining the cases in which parish registers have been tendered in evidence, that where it has not been satisfactorily made out that they are strictly authentic records of that public character which they purported to possess, they have not been admitted.

There are various points to be attended to in examining whether a parish register is or is not to be considered admissible in evidence, all of which arise from the principles above stated. In the first place, it is essential that the entries in the register which \*are relied [ \*481 ] upon to prove the fact in issue, should have been made by the person whose duty it was at the time to make such entries. Thus, in the case of *Doe d. Warren v. Bray*,<sup>(b)</sup> in ejectment, a register was given in evidence, containing an entry of the baptism of the defendant, in the year 1776. It appeared however, upon cross examination, that the entry was in the handwriting of the Rev. Dr. Smith, who was not minister of the parish till the year 1777—that during the years 1775 and 1776, the then incumbent of the parish was very infirm, and that the clerk entered on slips of paper an account of the baptisms, &c.; and his memoranda, which had been preserved, were produced, and there was no doubt that Dr. Smith had made from them the entries in the register book. It was objected that neither the register nor the memoranda made by the clerk were admissible in evidence. The learned judge having received them, and a verdict having been found for the defendant, a rule nisi for a new trial was obtained, on the ground that the evidence was improperly admitted. The court, having taken time to consider, were of opinion that there must be a new trial. Bayley, J., said, “Registers should be made up promptly, and by the person whose duty it is to make them up. The register of baptism, in this case, purports to bear date the 6th February, 1776, but it was not made up till June, 1777, and then it was made up, not by a person who was minister of the parish at the time of the baptism, or by a person who appeared at that time to have any connection with the parish, but by one who afterwards became the minister of the parish. I think, therefore, the register itself clearly ought not to have been received in evidence.” The memoranda of the clerk were likewise held to be inadmissible, because it was not his duty to make such memoranda, they were mere private entries. In the course of the argument in this case, Bayley, J., admitted “that in case the entry had been made in the register book during the life of the first incumbent, it might then be presumed that the clerk was authorized by the minister to make the entry, and then it would be the act of the minister,” in which case it is to be supposed that the entry might have been received in evidence.

Consistently with this principle, an entry made by the minister \*who performed the ceremony, though not the [ \*482 ]

(b) 8 B. & C. 813, (15 E. C. L. R.)

incumbent of the parish, is admissible. Thus, in the claim of Sir Cecil Bishopp to the Barony of Zouche of Haryngworth,(c) in 1804, the register of St. Peter the Great, Chichester, was put in evidence to prove a baptism in 1792. The clergyman stated that the baptism was performed, and the entry made in the register, not by himself, who was the then incumbent, but by a clergyman, a friend of his, who was uncle to the infant baptised, and who, in this instance alone, officiated for him. The baptism, he said, was entered the very day the service was performed, and he proved the handwriting of the clergyman. The house admitted the evidence.

One of the registers produced in the Chandos case had been kept by the parish clerk. Yet it seems to have been considered evidence, even though an error was shewn in the very entry for which it was referred to.(d)

It appears, from the expressions of the learned judge, in *Doe v. Bray*, that not only is it requisite that the entries should be made by the person whose duty it is to make them, but also that they should be made *promptly*. He states, as distinct objections to the admissibility of the register, that it was not made up *at the time* at which it purported to bear date, and that it was not made up by the proper person.

In the *De Lisle Peerage* case,(e) a register of St. Giles in the Fields was produced to prove a baptism in the year 1713; and though it appeared to be written *uno flatu* by the same hand, and at the same time, and consequently the entries in it could not have been made at the time of the performance of the ceremonies, it was received: but this was on the ground that the clergyman said it was the original; it may therefore be concluded that but for that statement it would have been rejected. The custom probably was originally according to the injunction of Cromwell, to make the entries weekly; but that custom seems to have been generally and properly abandoned, and [ \*483 ] the registers now \*commonly, as they ought to do in all cases, present a series of entries made immediately after the performance of the ceremonies registered therein. Without attention to this point, a register would be of little more authenticity in any case than one which is mentioned to have been made up from memory by the clerk after the original books had been destroyed by fire.(f)

It is further essential to the admissibility of a register that the entry relied upon should be that which appears in the register book itself, the authentic volume of parish records. It has been seen in the case of *Doe v. Bray*, that the memoranda of the clerk were held not to be admissible in evidence; and the case of *May v. May*,(g) to which in delivering the judgment in that case the learned judge referred, goes farther as an authority for the position just laid down. It seems that the memoranda of the clerk, in the case of *Doe v. Bay*, were rejected as being made by a person not authorized; and it may be inferred that if they had been made by the minister himself they would have been admissible, but that would only have been in the absence of a proper register for the period in question, and their admission would not be at variance with the rule established by *May v. May*. In that

(c) Min. Ev. 103.

(d) Chandos Barony, Min. Ev. 28, *post*, p. 485.

(e) Min. Ev. 134.

(f) Mr. Espinasse's Debates, New Parliament, 1827, p. 15.

(g) 2 Strange, 1073.

case, on a trial before Page, Probyn, and Lee, Justices, a register was produced by the plaintiff, which the clerk said was a book into which the entries were made once in three months out of the day-book, wherein the entries were made immediately after the christening, or next morning. This day-book itself was produced by the defendant, and there was a difference between it and the register in the entry in question. The defendant insisted that the entry in the day-book was the original entry. Page, J., was for allowing it to be read, but the other two judges were against it, saying that the other was the only register, and there could not be two registers in one parish; and the book was accordingly rejected. In a late case, before the House of Lords, it appeared that in the parish of St. Margarets, Westminster, two register books had been kept for the same period, one in the house of the minister and the other in the church; but the entry in question (dated 1766) being the same in both, the evidence was admitted \*without observation.<sup>(h)</sup> In this case, however, [ \*484 ] as both books were produced, and agreed with each other, no question arose as to which was the authentic register. It must be presumed that in the case of *May v. May*, both the entry in the day-book, and that in the register were made by the minister, or at most sanctioned by him, otherwise the objection allowed in *Doe v. Bray* would have applied. We may here also observe that the rule established by these cases, does not exclude all registers that are not strictly original documents.<sup>(i)</sup> Such a rule would exclude nearly all the earlier registers; which, as Lord Eldon observed of the register in the case of *Wingfield v. Walker*,<sup>(j)</sup> are in general mere copies. They were, however, copies made by authority of the constitution, which, as we have before seen,<sup>(k)</sup> was made in 1597, by the archbishop, bishops, and clergy of the province of Canterbury, and approved by the Queen, under the great seal.

A further requisite to the admissibility of a parish register is, that it should be found in, or produced from the proper custody.<sup>(l)</sup>

The House of Lords, in peerage claims, not only requires the production of the original register, but the presence of the person who has the custody of the register, that he may depose to its authenticity: and the observance of this rule will only be dispensed with in cases of extreme difficulty of complying with it. Thus, in a case where the clergyman could not attend, the register was produced by a person who swore that he saw him take it out of the parish chest, and that he received it from him in the same state as that in which he then delivered it.<sup>(m)</sup> And where the incumbent of two united parishes was unable to attend from infirmity, the curate of A. was allowed to prove the register of A., but not that of B.<sup>(n)</sup>

But in the case of parish registers, as of other documents, \*produced from unauthorized custody, evidence [ \*485 ] may be given to prove them authentic.

In the population return of the year 1801, for the parish of Ragdale,

(h) *Zouche, Barony*, Min. Ev. 113—169.

(i) See *Stafford Barony*, *post*, p. 488.

(j) 18 Ves. 445. The reader will find some very valuable observations upon parish registers in Lord Eldon's judgment in this case.

(k) *Ante*, p. 473.

(l) See 1 Phill. Ev. 460, 464.

(m) *Ross Barony*, Min. Ev. 396.

(n) *Tracy Barony*, 1842, Min. Ev. 3.

in Leicestershire, it is stated, that the register of that parish, to the year 1784, was in the possession of Earl Ferrers.<sup>(o)</sup> Parts of the register of two parishes are in the British Museum.<sup>(p)</sup> If these documents were produced in a court of justice, they could not be admitted in evidence, until it had been shewn by satisfactory evidence *akunde*, that they are truly the documents which they purport to be. Could it be proved, for instance, that A. B. was the minister of the parish at the time when any entry purports to be made in the book, and that such entry is in his handwriting, it may be presumed that this would be sufficient evidence of authority. The legal presumption of its non-authenticity, arising from its being found in improper hands, would be removed by positive evidence of its genuineness, and there could then be no further objection, on that ground, to its reception.

The evidence of a parish register, however is not conclusive in all particulars of the entry relied on, even against the party for whom it is produced. Errors may be shewn by extrinsic evidence to exist in some points, while the proof of the principal fact may yet rest on the register. Thus, in a register of St. Mary Magdalene, Canterbury, there were several entries of baptisms of children of John Bridges, in the first of which the name of the mother was entered as "Jane," and all the others as "Anne;" and evidence was admitted by the House of Lords to prove that the name of Anne was a mistake for Jane, for which purpose the counsel for the claimant was permitted to prove, first, that there was a memorandum at the beginning of the book, "note, this book was kept by the parish clerk, and it is not very accurate, and so it may appear from the wording and spelling;" secondly, that in a number of family deeds, this lady was called "Jane," and not "Anne."<sup>(q)</sup>

[ \*486 ] \*Besides shewing particular errors, it is open to a party to impeach the general credibility of the evidence when admitted. It may frequently happen that no objection can be maintained to the reception of a parish register, whilst at the same time very little credit may be due to it. Objections to the credibility of a register must however chiefly arise from the appearance of the document itself, as where there appears to be erasures, or alterations, not satisfactorily accounted for; and in such cases it will be for the jury to decide whether the entry as originally made, or as it appears at the time of inspection, is the true one, or whether, from the uncertainty, no credit is to be given to either.

Some of the registers produced in support of the claim to the Barony of Chandos presented very suspicious appearances. In the register of St. Michael's, Harbledown,<sup>(r)</sup> a large blot appeared upon the entry of the baptism of the second son of John Bridges and Maria his wife, in 1606, but enough was left to shew it had been Edward, son of John. The case of the claimant turned upon this Edward. There appeared to be recent mutilations of registers, and interpolations were suspected to have been made in the archbishop's duplicates; the records had been inspected by the claimant's agent alone.

(o) Pop. Abet. 1801, p. 154.

(p) Ayc. Cat. p. 70, No. 1677. Harl. MSS. No. 9523.

(q) Chandos Barony, Printed Ev. 26.

(r) Chandos Barony, Min. Ev. 99.

A case was lately tried in the Court of Common Pleas between parties of the name of Oldham, in which the question which should possess a fortune of 100,000*l.* depended upon the genuineness of a parish register. In the copy of the register sent to the bishop's registry, two persons were stated to have been married on a particular day. In the parish register there appeared to be an erasure in the exact place corresponding with the entry of the marriage in the copy; the dates preceding and following the erasure corresponded with the copy, and no entry of the marriage was to be found in that register, but there were several entries of the baptisms of children of the parties, all subsequent to the date of the erasure. In the register of an adjacent parish was found an entry of a marriage between the parties, of a date between the \*baptisms of the first and second [ \*487 ] son. Tindal, C. J., left it to the jury to presume whether the first marriage might not have been without consent, and that therefore another marriage in another parish had been had, and the entry of the first marriage erased as void. The jury, however, were of opinion that the erasure was fraudulent, and that the eldest was legitimate. In this case there was nothing upon the face of the register which would have been sufficient *per se* to impugn its credibility. The erasure of a single entry, unaccompanied by anything to confirm such an opinion, would hardly have been enough to enable the jury to presume that the entry erased was the identical one upon which the case must be decided, and that the erasure of it was fraudulent. The register did not prove the illegitimacy of the one claimant, but merely shewed nothing to the contrary; and that state of negative evidence was only turned into positive evidence for the other claimant, by the production of the other register; and even when the jury, by means of the bishop's copy, were satisfied of the fraudulent nature of the erasure, it was only in the case of that particular entry, that the character of the register was affected. The general credibility of it would be unimpeached, according to Lord Eldon's observations in the case of *Walker v. Winfield*,(s) that it would be too much to say that the loss of a leaf ought to destroy the character of a book otherwise correct. In the case of *Ansdell v. Gompertz*, tried before Gurney, B., at the Exeter Spring Assizes, in 1837, a register of very questionable appearance formed part of the evidence. That was an issue directed by the Lord Chancellor to try the legitimacy of a person of the name of Henry Gulling Isaac. The evidence which had been taken before the Master, in the course of the proceedings in Chancery, was read; by which it appeared that the marriage of the parents had taken place in 1783; and that certified copies of entries in the parish church of Honiton Clyst had been produced, shewing the baptism of Henry Gulling Isaac, in 1786, and his burial in 1814. In the register itself, however, it appeared that the entry of baptism, dated January 20, 1786, was on a page headed 1788, and that to it was appended a memorandum, dated February, 1788, in the handwriting of, and signed by the [ \*488 ] \*minister, stating that the name had been omitted to be registered in the proper place. In the same book was an entry of the baptism of J. J. B. Isaac, an elder brother of H. G. Isaac, dated 1784 :



and in the burial register of the same party, the age had been altered from thirty-seven to thirty-six, apparently with a view to set up his legitimacy; but an entry in the register of St. Mary Arches, Exeter, of his baptism there, in 1781, having been found, no attempt of that kind was made. The names of H. G. Isaac, and two younger sisters of his appeared to have been twice entered in the register, on different pages. There was an error also in the entry of his burial, in 1814, which named him as Henry Isaac, aged eighteen. The defendant contended that the evidence of these registers was not worthy of credit, and that in fact, in conjunction with the testimony of witnesses examined by him, at the trial, they made out a case of fraudulent attempt on the part of the plaintiffs to support the legitimacy of H. G. Isaac. The learned judge was of that opinion, and a verdict was accordingly found for the defendant. In Trinity Term, 1837, the plaintiff moved for a new trial, on the ground of a misdirection of the learned judge, but the Lord Chancellor refused the motion. In this case the register seems to have been of doubtful authority, although the case was decided upon the testimony of witnesses who proved that, in the year 1786, H. G. Isaac, must have been more than three years old. It should be observed that the register book had been rebound, in consequence of injuries received in a fire which happened at the church some years ago, and in many other respects, besides the entries above mentioned, appeared to have been very negligently kept.

But although one part of the register should appear to be a copy and inadmissible, it does not follow that the whole book must be rejected, if other parts had been regularly kept. Thus, to prove the death of the Countess of Stafford, the register of the Collegiate Church of St. Peter, Westminster, was produced. In the beginning of the book were these words, "The register of the Collegiate Church of Westminster, of weddings, christenings, and burials, such as could be found in imperfect books, and such as have been carefully taken notice of since the happy restoration of his Majesty, King Charles the 2nd, by [ \*489 ] Philip Tynchaw, \*Chadnter of the said church, installed February 11, 1660." The entry in question was made in 1693, and was admitted.(t)

The possibility that a parish register, even when admitted, may not be deserving of credit, and the fact that any doubts of its credibility must, in such a case, be chiefly founded upon the appearance of the book itself, give rise to an infirmity in this sort of evidence, which has been noticed by Lord Eldon.(u) The practice of admitting the copy of a register, without more than merely proving it to be a copy of the register, is to be justified only upon the ground that the register cannot be conveniently spared from the place where it is supposed to be deposited. The danger of fraud arising from it is very great, and numerous cases may be cited, in which copies of registers have been admitted, when no credit was due to the original. In the case of *Lloyd v. Passingham*,(v) it appears that copies of the St. Pancras register had been admitted as evidence, and that, upon their evidence, the jury had found a verdict, when, had the original itself been pro-

(t) *Stafford Barony*, Min. Ev. 104.

(v) 16 Ves. 54.

(u) *Walker v. Wingfield*, 18 Ves. 444.

duced, it would have appeared on the face of it to have been so tampered with as to be unworthy of credit. In *Fairlie v. Freeman*,<sup>(u)</sup> Lord Eldon said that he remembered a case in which, after a verdict had been obtained upon a copy of a register, the defendant against whom the verdict was given, compared the copy with the original register, and thereby deterred the plaintiff from proceeding to trial for another large property upon the same evidence. In the case of *Ansdell v. Gompertz*,<sup>(x)</sup> an inspection of the register itself, shewed the manner in which the entries had been altered; but it also shewed that the register book had been throughout so carelessly kept, and the entries so irregularly made, that it was difficult to say whether the alterations were or were not fraudulent. From these cases, and others not particularly enumerated here, it may be thought desirable that the general rule of law should be applied to parish registers kept under the old system. The House of Lords, as we have seen,<sup>(y)</sup> have, since the *Chandos* case, come to a resolution not to admit as evidence in peerage claims the copies of registers, but to require 'the production of the originals. It was stated in a former [ \*490 ] page,<sup>(z)</sup> that it appears not quite settled whether the rule extends to Scotch and Irish registers, and the case of the *Borthwick Barony* was cited as an instance in which it had not been enforced with respect to a Scotch register. Several other instances occur in the minutes of evidence, on the *Lovat* peerage claim, in 1826. Extracts from the kirk session book of *Inverness*, certified by a writer to the signet, as having been compared with the record and signed by the session clerk,<sup>(a)</sup> in his presence, were admitted apparently without objection, to prove, in one case, the death, and in another, the baptism of a son of Lord *Lovat*.<sup>(b)</sup>

In the same case, various certified extracts from the baptismal register of the parish of *Kiltarlity*, in *Inverness-shire*, were put in evidence; the person producing them was examined on oath as to their accuracy, but the original book does not seem to have been called for.<sup>(c)</sup> Again, on the claim of *J. J. H. Johnstone* to the *Earldom of Annandale*,<sup>(d)</sup> an office copy of the contract of marriage between *Charles Hope* and *Lady Harriett Johnstone*, daughter of the *Earl of Annandale*, extracted from the original record in the books of council and session in Scotland, was admitted. It would appear, from these cases, that the house will not always insist on the production of the originals in the cases of Scotch registers.

In a late case, the original register of a Scotch parish was produced by the session clerk, who was examined as to the custody of the books; but it does not appear that the book itself was produced in consequence of any intimation from the house that an extract would not be received.<sup>(e)</sup> It undoubtedly seems unreasonable that if copies of English registers are to be rejected, the house should be required to admit copies of registers from Scotland or Ireland, where fraud, if

(u) *Burr.* 208.

(x) *Supra*, p. 12.

(y) *Supra*, p. 97.

(z) *Supra*, p. 97.

(a) *Min. Ev.* 72, 73.

(b) The Kirk Session book in Scotland is, in fact, the parochial register, and is intrusted to the custody of the session clerk. See evidence of *Mr. Broadfoot*, *Rep. of Com. on Par. Reg.* p. 128, and see post.

(c) *Min. Ev.* 78, 79.

(d) *Annandale Earldom*, *Min. Ev.* 17.

(e) *Airth Earldom*, *Min. Ev.* 65.

existing, would not be more readily detected. It may be thought more necessary to require the production of original registers in peer-  
 [ \*491 ] age claims, than in \*claims to property in courts of law, because in the former there is generally no opposing party, and the register if not produced by the claimant, would not appear at all, whereas in claims to property, if it is the interest of the plaintiff to keep back the original register, it will be the interest of the defendant to produce it; and consequently between them, the original would be sure to find its way into court; but in practice it is not often that such is the case, and even if it were so, it is no sufficient reason for not requiring the production of the original in the first instance. The remark of Mr. J. Buller, that the propriety of admitting proof *visà voce* of the contents of a register, without a copy, may well be doubted, (f) applies equally well to the admission of a copy, because as he says, it is not the best evidence the nature of the thing is capable of. Under the regulations of the 6 & 7 Wm. 4, c. 86, the evils of the practice above commented upon are much lessened, with respect to future registers, inasmuch as the greater care which, under that act, will be bestowed, both in making the entries and preserving the books, will increase the value of copies, as compared with originals. Having provided for the better keeping of the registers, the act proceeds to make copies of them under some restrictions, good evidence. The 38th section of the act provides that a certified copy of any entry under the seal of the General Registry Office shall be received as evidence of the birth, death, or marriage, to which the same relates, without any further or other proof of such entry; and as under ss. 32 and 34, certified copies of all registers are to be forwarded four times a year through the superintendent registrars to the general registrar, certified copies of all entries more than three months old will be attainable under the seal of the General Registry Office. (g) The provisions of section 38 also extend to copies of all registers of marriages kept by clergymen, the registering officers of Quakers, or the secretaries of Jewish synagogues; by section 33 they are required to transmit four times a year, [ \*492 ] to the superintendent registrar, \*certified copies of all marriages celebrated by them since the last return, which certified copies will be forwarded by the superintendent registrar to the General Register Office. As the registration of births and deaths is provided for by the act, instead of that of baptisms and burials, there is no provision for forwarding copies of those registers, (which, however, are still kept) to the superintendent register, and therefore the provision of the section 37 does not extend to them. This, however, seems of little consequence, as it is probable that few births, and still fewer deaths, will occur, which will not be duly registered by the registrars appointed under the act.

(f) Bull. N. P. 247, a.

(g) It seems doubtful whether the House of Lords in claims of peerage will admit these copies. A copy of an old record sealed with the seal of the Record Office, in accordance with the provisions of 1 & 2 Vict. c. 94, ss. 12 & 13, has been admitted by the committee of privileges in a recent case (Fitzwalter Barony,) but the language of s. 13 of that act is much more comprehensive than that of 6 & 7 Wm. 4, c. 86, s. 38, and expressly includes "either House of Parliament or any committee of either House." The same observation will apply to s. 11 of 3 & 4 Vict. c. 92, the Non-Parochial Register Act.

Having treated of parish registers with reference to their admissibility and credibility, and that of attested copies of them, it remains to consider briefly what facts may be proved upon the evidence of such documents,<sup>(h)</sup> since it is clear, as it is laid down in Sheppard's Abridgement,<sup>(i)</sup> that a "church book is not to be given in evidence, to be a sufficient proof of any thing recorded within it." For this purpose, bearing in mind the principle upon which these records are admitted at all, the practitioner must look at the transaction of which the register is a public record, and must also distinguish the statement of that transaction from the statement of any other facts which may appear upon the register. The rule appears to be, that a register is evidence of those transactions only which, as part of his public duty, the officiating minister was bound to record. But as the different enactments under which registers have, from time to time, been kept, have not always provided for the registration of the same particulars, it would seem to follow that registers of different periods might be admitted to prove different facts. Thus, we have seen, that the ordinance which was made in the year 1644,<sup>(j)</sup> directed the time of birth and death respectively to be registered in the cases of baptisms and burials, and in respect to the registry of births, this ordinance was followed by that of 1653,<sup>(k)</sup> which latter continued in force till the Restoration, in the year 1660. It might, therefore, be fairly contended, that a register of that period, containing \*an entry [ \*493 ] of the time of birth of any individual, must be admitted to prove the time of such birth: and the same might be said of a register containing an entry of the time of death of any person, recorded to have been buried between 1644 and 1653. Again, in the year 1694, by 6 & 7 Wm. 3, c. 6,<sup>(l)</sup> amended and extended in the following year, by 7 & 8 Wm. 3, c. 35, and continued by 8 & 9 Wm. 3, c. 20, to the 1st of August, 1706, births are directed to be registered: and in the year 1793, the 23 Geo. 3, c. 67, which was repealed in 1794, by 34 Geo. 3, c. 11, imposed a stamp duty upon every entry of, amongst other things, births, the registration of which was thereby recognised by law. From the year 1694, therefore to 1706, and from 1793 to 1794, the ministers must be considered to have been authorized to register births as well as baptisms, and the register ought accordingly to be considered good evidence of the time of such births. Nor will it appear, upon consideration, more repugnant to the general rules of evidence to admit a register in proof of the time or place of birth or death, than in proof of the parentage or identity of the party whose baptism is registered: at least in cases where the baptism appears by the register to have taken place soon after the birth. A baptismal register for instance, records that on a day therein stated, the minister baptised a child, the son of A. and B.; suppose it to add further the day on which the child was born, how can it be shown that the parentage of the child so baptised was more within the knowledge of the minister than the time or place of the birth? The case of a burial register recording the time of death is even stronger, for there is

(h) This subject has been already partially treated of under some of the preceding heads. See *supra*, pp. 164, 436.

(i) Shep. Ab. tit. Trial.

(j) *Ante*, p. 474.

(k) *Ante*, p. 475.

(l) *Ante*, p. 475.

greater probability that the minister should of his own knowledge be able to state the time of the death of a person whom he has buried, than the truth of the description by which such person is registered. But however this may be, it must be admitted that the rule of law, is that which has been stated in former pages,<sup>(m)</sup> that prior to the act for registration now in operation, neither registers of baptisms nor of burials, were, as registers, evidence of the time or place of birth or death, or in fact of anything except the time and place of baptism or burial.

[ \*494 ] Thus, in support of an indictment for fraud, on the part of \*the defendant, by pretending to be of the age of twenty-one, an examined extract of a register of baptisms was put in, which stated the day the defendant was baptised, and the day on which he was born, but Lord Tenterden, C. J., would not permit the part respecting the time of his birth to be read, saying, that the entry was not evidence of that, it was only proof of the baptism.<sup>(n)</sup> And in another case where the register of baptisms shewed that the defendant was baptised in 1807, but contained an entry that he was born in 1779, Bayley, J., was of opinion that the entry relating to the time of birth was not evidence of the fact. On a motion for a new trial on the ground that it was at least evidence to confirm the statement of the mother, who had been examined, the Court was of opinion that the entry was not evidence to prove the age of the party, it was nothing more than something told the clergyman at the time of the christening, concerning which he had not power, by law, to make an entry in the register; he had neither the authority nor the means of making an entry, and the rule for a new trial was refused.<sup>(o)</sup>

In a case recently before the House of Lords, an entry of a peculiar nature seems to have been admitted.<sup>(p)</sup> The register of East Teynham, in Norfolk, was produced to shew the date of the birth of Mr. C. Townsend. The entry was as follows:—"1675, Charles Townsend, the son of Horatio, Lord Townsend, and the Lady Townsend, was born, April 18th, and baptised May 2nd, in the parish of St. Martin's in the Fields, Westminster." The register of St. Martin's in the Fields was produced, but no entry of the baptism of Charles Townsend was found in the year 1675. It was suggested by the counsel that it was to be presumed that the child had been privately baptised, but not registered in the parish in which he was born; but afterwards registered in the parish in which his parents resided. No objection appears to have been made to this entry being received; the point sought to be established, as to the date of the birth, was however proved by other evidence, and it is probable that not much weight, if any, was given to the register. This case, therefore, cannot be considered as impeaching the rule above laid down.

[ \*495 ] \*But in the Lovat Peerage case,<sup>(q)</sup> there occurs a remarkable instance of the admission of a parish register to prove a fact not within the province of the minister to record. In

(m) *Supra*, pp. 184, 246.

(n) *Rex v. Clepham*, 4 Car. & Payn. 29, (19 E. C. L. R.)

(o) *Withen v. Law*, 3 Stark. 63, (14 E. C. L. R.)

(p) *Camoy's Barony*, Min. Ev. 167.

(q) *Lovat Barony*, 1826, Min. Ev. 65.

the register of Kilmorack, in Inverness-shire, is the following entry : —“ At Kilmorack, February 17, 1687, Luke Houston presented his daughter, called Glosset, to be baptised. Godfather, Mr. Aber. Fraser, younger of Bewport, and Alexander Fraser, eldest son to farmer Fraser in Beaulie.” This was used to prove part of the pedigree of the Fraser family. The evidence seems to have been received without objection.

It will be observed that in the case of *Wiheu v. Law*, the register showed that the entry had been made at least twenty-six years after the fact purported to be recorded ; and the statement of birth therefore wanted that confirmation which registers of infant baptism receive from the circumstances of the case, where it may be concluded that the appearance of the infant at the time of baptism would preclude the possibility of any great misstatement as to its age, escaping detection. This circumstance of baptism in infancy proved by evidence *dehors* the register has been already mentioned, as raising a presumption that the infant was born in the parish in which its baptism is registered.(r) But apart from this extrinsic and additional evidence, the fact of a person having been baptised in a particular parish, would be no proof, nor would it even raise a presumption that he was born there.(s) Of course a statement in the register of the place of birth would be even less available as evidence of the fact. In the case of *Doe v. Bray*,(t) Bayley, J., said of *May v. May*,(u) that the editor of Burn's Ecclesiastical Law thought that the entry in the day-book would not be receivable in evidence in the character of a register, but that if it had been signed by the reputed father and mother, it might have been received as a declaration of the deceased parents.]

\*Under 1 Vict. c. 22, s. 58, the Registrar General is empowered to direct that the place of birth or death of any [ \*496 ] person, whose birth or death shall be registered under the act for registering births, deaths, and marriages,(v) shall be added to the entry in such manner as he shall direct, and such addition shall be taken to be part of the entry. Under the authority of this act, the Registrar General made an order, dated the 3rd of July, 1837, requiring the place of birth and death to be registered.(w)

Passing to the subject of those copies or transcripts of parish registers, which are deposited in the registers of the several dioceses, it may be useful to the practitioner to introduce a succinct statement of the degree of compliance or neglect, which the regulations for forming these very useful registries have from time to time received. The constitution of 1597, and the canon of 1603, whereby duplicates of parish registers were first ordered to be transmitted to the registry of the diocese, have been already noticed in the history of the originals. The transmission of these duplicates had become so generally neglected that, according to Lord Eldon, its better enforcement was the chief object in passing the act of 52 Geo. 3, c. 146.

(r) *Supra*, p. 435.

(s) *The King v. South Petherton*, 5 B. & C. 508, (11 E. C. L. R.) *The King v. Trowbridge*, 7 B. & C. 253, (14 E. C. L. R.) But see *The King v. Church of St. Michael's, Barr.* 8 C. 765.

(t) 8 B. & C. 813, (15 E. C. L. R.) *ante*, p. 481.

(u) 6 & 7 Wm. 4, c. 86.

(v) 2 Stra. 1073, *ante*, p. 483.

(w) 1 Rep. of Reg. Gen. p. 57.

By the 6th section of this act at the expiration of two months after the 31st of December in every year, fair copies of all the entries of the several baptisms, marriages, and burials of the year preceding are required to be made by the officiating minister, or by the churchwardens, or other person appointed by him, on parchment, in the form prescribed in the schedules annexed to the act, and the contents of such copies are to be verified in the form prescribed by the officiating minister, and his signature attested by the churchwardens. Such copies are to be transmitted by the churchwardens, by the post, to the registrar of the diocese, on or before the 1st of June, in every year.(x) The registrar is required before the 1st of July, in every year, to make a report to the bishop, whether the copies have been duly transmitted, and in the event of any failure of transmission, he is to state [ \*497 ] the \*default of the parish or chapelry specially in his report to the bishop.(y) In case of neglect or refusal by the minister to verify the copies, the churchwardens are required to certify such default to the registrar, who is to state the same specially in his report.(z) The copies so transmitted are to be safely kept, and properly arranged by the registrars, and alphabetical lists of names and places, are directed to be made out.(u) which lists and also the copies transmitted shall be open to public search at all reasonable times on payment of the usual fees.

The bishop of the diocese, together with the *custodes rotulorum* of the several counties within the diocese, and the chancellor thereof, were directed, before the 1st of February, 1813, to survey the places where the parochial registers, and the wills proved within the diocese were kept, and to make reports to the privy council before the 1st of March following, respecting the same and the most suitable mode of remunerating the officers employed in each registry for their additional trouble and expense in carrying the provisions of the act into execution.(b)

The directions in the 12th section respecting the arrangement of the copies, and the making out of alphabetical lists have not been carried into effect, in consequence of there being no fund provided for the payment of the persons employed therein; nor does any thing seem to have been done upon the 13th section respecting the buildings for the custody of duplicates.(c) .

The commissioners of public records, in 1800, extended their inquiries to the state of these transcripts, and they have published in their first report the returns from the registrars of the different dioceses in England and Wales, which show the number of parishes in each diocese transmitting copies on the average of the ten years preceding. In 1836, returns were made from the same officers to the order of the [ \*498 ] House of Commons, shewing the \*number of parishes not duly transmitting duplicates in each year since the passing of Mr. Rose's act, up to and including 1829. From these two

(x) Sec. 7.

(y) Sec. 8.

(z) Sec. 9.

(a) Sec. 12.

(b) Sec. 13.

(c) Preliminary observations to Pop. Abst. 1821, p. xxii. The direction respecting transcripts cannot be carried into effect, until proper buildings or receptacles in each diocese, and a fund for the payment of persons employed in such arrangement shall have been provided.

sources a table has been compiled which comprises the whole of the information in the report of the commissioners, in 1800, and so much of the returns to the House of Commons in 1836, as respects the year 1829, (d) thus exhibiting the state of transmission before and after the passing of Mr. Rose's act. (e)

It will be seen, by reference to this table, that Mr. Rose's act has in a great degree failed in its object of securing the regular transmission of duplicates to the bishop's registry. Nor is this matter of surprise, considering that the only punishment for neglect of transmission is that the defaulter shall be specially reported to the bishop. The inefficacy, however, of the provisions of this statute is much to be regretted, as many instances have occurred where the preservation of these duplicates has proved of signal service in detecting the falsification of the originals by erasure or otherwise, as well as in proving their correctness, or supplying the want of evidence occasioned by their loss.

Thus, in the claim to the Barony of Chandos, a marriage was proved by the duplicate of the parish register of Owre, in Kent, which was produced from the registry of the Archbishop of Canterbury, the incumbent being first required to prove the loss of that part of the original which comprehended the period of the marriage. (f) In the same case, the house not being satisfied with the appearance of the register of Maidstone, for the year 1608, called for the duplicate from the registry of the Archbishop of Canterbury, which was proved to correspond. (g) On the other hand, in the claim of Gertrude McCarthy to the Stafford peerage in 1825, suspicion being excited as to some entries of marriages, the duplicates of the bishop of Worcester were called for, and the entries in the originals discovered to have been forged. (h)

Bigland relates that by an appeal to the duplicate of the bishop of Sarum, a forgery in a parish register was discovered, which had been committed for the purpose of preventing super-annuation in one of the universities. The true name [ \*409 ] regularly entered in its proper place had been altered to another by an erasure of two letters in the middle of the word, and inserting upon that erasure three different letters in their room, and then placing the real name under a date of two years later. (i) The case of the Attorney General v. Oldham, cited above, (j) may be referred to here, as being another exemplification of the utility of preserving the copies of parish registers in the registries of the bishop; while the case of Ansdell v. Gompertz, (k) in which no bishop's transcript of the registers produced was to be found, affords an instance of the uncertainty which may be caused by having no such repository to resort to.

In the above cited case of peerage claims the duplicates themselves were put in evidence, according to the rule of the house previously

(d) No average of years was struck upon these returns; but the difference in the number of defaulters between one year and another is not great.

(e) This table will be found in the Appendix, where is also given a brief summary of the state of transcripts in Ireland, taken from the Second Report of the Commissioners.

(f) Printed Evidence, p. 44.

(g) Printed Evidence, 1825, p. 23.

(h) Ante, p. 486; and see Par. Reg. Min. Ev. p. 26.

(i) Printed Evidence, p. 45.

(j) Bigland, 62.

(k) Ante, p. 487.



mentioned, which requires the originals of parish registers to be produced, to the exclusion of examined copies; and perhaps that rule of the House of Lords might be advantageously adopted by the courts of law. This subject has been previously considered in respect to the registers themselves, but the practice of the courts with reference to transcripts is not so well settled. In the case of *Beer v. Ward*, in order to confirm an entry of marriage in 1742, the duplicates at York were resorted to, and in the first issue an examined copy of the entry in question, signed by the deputy registrar, was put in evidence without objection: on the trial of the second issue, the duplicate itself was produced. This case, however, can hardly be considered strong enough to warrant the conclusion that a copy of a bishop's transcript would be admitted; for it must be observed that it does not appear, from the case of *Beer v. Ward*, that the evidence would have been received in the first issue if any objection had been taken to it, and that in fact on the trial of the second issue the transcript itself was produced. The question appears to resolve itself into this, whether the bishop's transcript is to be considered an original document, or merely a copy of the parish register; if the former, then by analogy to the [ \*500 ] rule of the court which allows of copies, these transcripts \*must be admitted; if the latter, then as being merely copies of copies, the common rule of evidence would exclude them. We have seen, in tracing the history of parish registers, that the same authority which instituted them, prescribed the preservation of copies of them in the bishop's registries; those copies were to be made and transmitted annually by the minister, and it seems, therefore, difficult to contend that they are not equally authoritative, and equally official documents with those which the ministers retained. Lord Eldon seems so to have considered them, for in the case of *Lloyd v. Passingham*, (l) he says, "By the canon law the clergy are required, every week, to form and sign these registers, and to send annually a duplicate to the ordinary: which duplicate being by the laws required to remain with him, would itself be evidence." On the ground, therefore, of the public nature of the document, it seems that a bishop's duplicate should be considered primary evidence, and as such admissible without proof of the loss of the parish register, of which it is a copy; and on the ground of the inconvenience of allowing it to leave its proper repository, an examined copy of it would be good evidence. Indeed, as the preservation of these transcripts was intended as a check, by which to verify the registers, the object of their institution would be defeated, if they were not preserved with the utmost precaution, from any danger of falsification; their removal, therefore, from the proper custody, would seem more to be guarded against than that of parish registers themselves. In a recent case, this subject came more expressly under the consideration of the Court than in any previous one, and the determination of the learned judge who tried the cause, may be considered as almost establishing the validity of a bishop's transcript, as primary evidence.

The case alluded to is that of *Walker v. Beauchamp*, (m) tried before Alderson, B., in which an examined copy of the transcript of

(l) 16 Ves. 63, *supra*, p. 486.

(m) 6 Car. & Payne, 554, (26 E. C. L. R.)

a parish register from the bishop's registry was given in evidence. The loss of the original register was not proved. The learned judge said, that if he had definite proof of the loss of the original register, he should admit the examined copy of the return \*beyond [ \*501 ] all doubt; (a) that as the return was an authenticated copy of the original taken under the canon; and as that is a public document, an examined copy of what was found in the bishop's registry might be put in; but the loss of the original register should be shewn. It was objected by the counsel for the defendant, that a copy of the return in the bishop's registry would not be admissible; and a distinction was also taken between the transcripts made under the canons, and those under the 52 Geo. 3, c. 146, the former of which, it was argued, would be only binding upon ecclesiastical persons; but as the early registers themselves were only made by the authority of the canons, it does not appear that this distinction is tenable. The learned judge, in the end, though expressing considerable doubt on the subject, determined to receive the evidence. He said, "this copy in the bishop's registry was made by the vicar, under the canon; that therefore is a copy made by public authority, and deposited in a public place. I take that, therefore, to be evidence that there was an original, and that that is a true copy of such original. I think further that that return, *being a copy of the register made by public authority, is evidence*, and that it being itself a public document, the same rule applies as to the inconvenience of its removal, and therefore an examined copy of that return is receivable." It appears, however, that the copies were not put in; but from the expressions of the learned judge, he seems to have concluded that the transcripts are to be received as original documents with respect to their admissibility; and if so, it would appear to follow that proof of the loss of the original register need not be given to render a transcript admissible in evidence. The question, "If transcripts are merely copies, how could they be evidence to contradict the original register, as they were in the Angel case?" (o) is not answered by saying, that they are received, as the declaration of some person that he made a copy of the original, and that when he made it the original was different; if this were the ground for receiving transcripts, it would follow that they would not be evidence without first proving the death of the person who made the copy, and that in his lifetime they would not be evidence at all. It is certainly the practice of the House of [ \*502 ] Lords in Peerage claims, to require proof of the absence of an original register before admitting the bishop's transcript. Of this, the Chandos case above cited, is an example. (p) So in the Tracy case, in order to prove a burial in 1662 from a transcript in the diocesan registry of Gloucester, it was first proved that the earliest extant register in the parish in question commenced in 1666. (q) But the House of Lords, in cases of this nature, has its own peculiar rules of evidence.

(a) In the Leigh Peerage case, the register of Wigan, in Lancashire, being proved to commence in 1668, the transcript from the bishop's registry was put in to prove a baptism in 1658. Mip. Ev. 1829, p. 164.

(o) This case was referred to more than once in Walker v. Beauchamp, but no report of it has been met with.

(p) See p. 499.

(q) Tracy Barony, Min. Ev. 66.

What little authority can be collected on this subject from cases at law, seems rather in favour of that course which a consideration of the object for which these transcripts are preserved, and the principles upon which public documents are admitted as evidence, would point out, namely that they are good evidence of themselves, and independently of any proof of the loss of the originals; for it would be inconsistent to hold that transcripts shall be treated as originals, so as to allow copies of them to be evidence, but they shall be treated as mere copies, so far as to be only admitted in evidence themselves upon proof of the loss of the originals.

[ \*503 ]

## \*CHAPTER II.

## DISSENTERS' REGISTERS.

As parish registers were records of the performance of certain ceremonies according to the rites of the Established Church, all those whose religious opinions debarred them from partaking in those ceremonies, were necessarily excluded from the civil benefits of the registration. Large bodies of Dissenters, members of the society of Quakers, Roman Catholics, and Jews were thus left to their own resources for the means of preserving evidence of their respective descents. This led to the establishment amongst those bodies of separate registers, in which matters of pedigree relating to persons of their persuasion might be recorded, in a similar manner to those preserved in parish registers.

These registers extend to several thousands of volumes, and are many of them of considerable antiquity. Those of the Dissenters consist chiefly of registers of births and baptisms: there are also some of deaths and burials; but the operation of the Marriage Acts, before the last statute on this subject, rendered separate marriage registers amongst them unnecessary.

The first in point of numbers and importance are the registers of "the Three Denominations," under which general appellation the Presbyterians, Independents, and Baptists have been long described. The registers of the Presbyterians and Independents are registers of births and baptisms, and in some instances of deaths and burials. The entries of births and baptisms are made by the minister who officiated at the baptism, and are generally attested by his signature. In most of the registers in which the signature is omitted in the separate entries, there is a title or heading to the book in the handwriting of the minister, with his name affixed to it, indicating that the ceremonies therein recorded were performed by him. These registers seem for the most part to have been accurately and faithfully kept.<sup>(a)</sup>

The registers of the Baptists are of a different character, being

(a) These, and many of the following particulars respecting non parochial registers, are extracted from the Report of "the Commissioners to inquire into the state, custody, and authenticity of Registers or Records of Births or Baptisms, Deaths or Burials, and Marriages in England and Wales other than the Parochial Registers, 1838," p. 9, et seq.

records, not of baptisms, but of births. As regards the registers of births, the general usage appears to have been, that shortly after the birth of a child, the minister of the congregation to which the parents belonged, dedicated the child with prayer; and, thereupon, if a register was kept in the congregation, he entered therein the name of the child and the date of the birth, as then reported to him, adding in some instances the date of the registration. In other cases, the entry was signed by the parents, or one of them, or by witnesses who were present at the birth. Besides these registers, other books have been kept on a different principle, being mere certificates, not entered contemporaneously with the dedication of the child, not attested by the signature of either of the parents, nor of any witnesses present at the birth, and not bearing any date when the entry was made.(b)

The registers of the Wesleyans and Calvinistic Methodists of the Countess of Huntingdon's connexion, of the Moravians, and of the Swedenborgians are also registers of births and baptisms, with some records of deaths and burials; and the books were, in almost all cases, kept by the officiating minister, and authenticated by his signature either appended to the several entries, or written on the title or heading of the register. The registers of the Methodists differ from others in this respect, that most of them have been kept, and the entries made by a church officer appointed, and duly authorized for the purpose, by the recognised heads or directors of those religious communities.(c)

The Wesleyan Methodists, independently of their \*con-regational registers, instituted in 1818 a Metropolitan [ \*505 ] Office in Paternoster Row, for the registration of the births and baptisms occurring amongst their different communions.(d) The practice at this office was to issue to persons desirous of using the register, blank forms printed in duplicate on parchment, which, when filled up, were signed by the parents, and by witnesses who might have been present at the birth, as well as by the minister. The forms contained the maiden name of the mother; when filled up and signed, one of the duplicate copies was entered in a book, and preserved at the office, and the other was given to the parties.(e)

A register of births for Dissenters of every denomination has been kept with much care since the year 1766, at Dr. Williams's Library, in Redcross-street, Cripplegate.(f) The system pursued at this office appears to have been much the same as that of the Wesleyan Metropolitan office, and the entries contain nearly the same particulars; the certificates are also attested by the parents or other near relatives, and witnesses.(g) In this office were also preserved seventeen registers of births, baptisms, and burials of different Dissenting Chapels which had ceased to exist.(h)

In addition to the registers of burials in the burial grounds attached to the various Protestant Dissenting Chapels, there are numerous registers belonging to the Bunhill-fields burial ground. This burial ground

(b) Ubi sup. p. 9.

(c) Ubi sup. p. 10.

(d) Ubi sup. p. 10.

(e) Report from Sel. Com. on Parochial Registration, 1833. Min. Ev. 112. See form of Certificate, ib. Appendix, 151.

(f) Ibid. Min. Ev. 63. 79.

(g) Ibid. Appendix, 150, where forms are given. (h) Rep. on Reg. p. 12.

is the property of the City of London, and for many years has been used as the principal burial place for Dissenters. The registers commence on the 1st of April, 1713, from which time to 1788, they were negligently kept, but from that year to the present time they are reported to have been preserved with considerable care.(i)

Besides these, registers of burials have been kept at many cemeteries, which have been established within these few years. These [ \*506 ] registers have been regularly kept by registrars appointed \*by the proprietors. In the Acts of Parliament under which these cemeteries have been established, there is generally contained a clause, directing a register of all burials to be kept, and certified transcripts to be sent to the diocesan registry in the same manner as is provided for parochial registers; and these registers and transcripts, and properly certified copies of them are made legal evidence. In acts of this kind, passed since the general Registration Act, the fees for searches, and extracts, are made subject to the provisions of that act.

Besides the registers of the different dissenting bodies above enumerated, there are the registers of the foreign Protestant Churches in England. The principal of these are the registers of the Walloon and French Churches, which contain entries of the baptisms, marriages, and burials of foreigners, who had fled from religious persecution in their own countries. They are of considerable antiquity, commencing in the year 1567. There appear to have been at one time as many as sixty-four congregations, but at the present period only five or six of these churches are in actual existence. Many of the registers, however, of the chapels which have, from time to time, ceased to exist, including the French Chapel Royal, dissolved in 1830, have been carefully preserved. They are all written in the French language, and are stated to have been kept throughout with scrupulous accuracy and care.(j)

There are also some registers belonging to the German Chapel Royal, and the German Chapel in Trinity-lane, in the City of London.(k)

Registers of baptisms and burials amongst the Roman Catholics have been generally kept by the clergy of that persuasion; but the same cause that has been assigned for the non-existence of marriage registers amongst the Dissenters, operates to render them infrequent amongst the Roman Catholics. The entries of baptisms generally contain the date of the birth, and the maiden name of the mother, together with the names of the sponsors. It does not appear that [ \*507 ] much care is taken to ascertain the truth of the \*statements as to the birth. When it is remembered that for many years the exercise of the ministerial duties by Roman Catholic clergymen was prohibited by very severe enactments, and was attended with great personal risk, the imperfect state of their older registers will not be matter of wonder.

The Jews and Quakers have always enjoyed the privilege of celebrating their marriages according to their own rites, and have not been required to conform to the ceremonial of the Church of

(i) Rep. on Reg. p. 2.

(j) Rep. on Reg. p. 8.

(k) Ibid.

England. Their registers therefore include marriages, as well as births and deaths.

Amongst the Quakers<sup>(1)</sup> two registers of all marriages according to a prescribed form, are signed on the day of the marriage by the parties themselves and three witnesses, the latter adding their place of abode and occupation. The form contains the date of the ceremony, the name, residence, and occupation of the man, the name of the woman, and the names, residences, and occupations of the parents of each party. If the woman has been previously married, she is described as the widow of her last husband. The registers are delivered at the monthly meeting next occurring, to which the woman belongs; and having been carefully examined, one of them is preserved in the book kept for that purpose belonging to the monthly meeting, and the other is taken to the quarterly meeting, fixed in the proper book and indexed. The registers of births and burials are effected by means of birth notes and burial notes, issued by persons duly appointed for that purpose. On the occasion of a birth, two birth notes are filled up with the date of the birth, the names and residence, and description of the parents, and the name and sex of the child: these notes are signed by the parents, and by witnesses, if any were present: they are generally filled up within a month, and at the first monthly meeting are compared and signed by the clerk; they are then entered in a book kept for the purpose, and are forwarded to the quarterly meeting once a year, placed in a proper book, and indexed. The burial notes when filled up \*contain the [ \*508 ] name, occupation or addition, and residence of the deceased, with the date of his death; and no burial can take place without such a note having been issued: the note is signed by the grave master after the interment, and is afterwards registered in a similar manner to birth notes. The registers of the Quakers commence as early as the year 1655; and the Commissioners for inquiring into the state of Registers, bear honourable testimony to the order and precision with which they have been kept.<sup>(m)</sup>

The registers of the Jews appear to be somewhat less particular and accurate than those of the Quakers. They are kept at the different Synagogues, and are in the custody of particular officers. The entries at the Great Synagogue in Duke's Place, are in a tabular form, and in the case of marriages and burials are made from notes taken at the time by an official person who attends for that purpose. The entries of marriage contain the date of the ceremony, the names of witnesses and the names of the parties, as well as the priest. It does not appear that the parties are described by their addition or residence. In the burial registry the late residence of the deceased is added. The entries of births contain the residence and names of the parents, the day of naming, the day of birth and the name of the child. No official person is generally in attendance at the time of naming, and the register is therefore not so much to be depended upon as those of marriages and burials: many births are never registered

(1) Par. Reg. Rep., evidence of J. Pease, Esq., p. 73, and Appendix, No. 5, p. 147, and Rep. on Reg. p. 12, and Appendix, p. 155.

(m) Rep. on Reg. p. 12. For forms of the notes see the Appendix to the Report P. p. 172, and see Par. Reg. Rep. Appendix, No. 5, p. 147.

at all. Evidence is more easily attained with respect to males than females; the circumcision of the former being a ceremony, which always performed in the presence of witnesses, and at a fixed period after the birth; but in the case of female children there is no public ceremonial to insure the presence of witnesses.(n)

The registers of marriages performed at the Fleet and King's Bench prisons, and the Chapels in May Fair, and the Mint in South-  
[ \*509 ] wark, have been mentioned in a former page.(o) The \*greater number of them have been purchased by Government and deposited in the Consistory Court of London; they have formerly on some occasions been admitted as evidence,(p) but the modern decisions are against their admissibility.(q)

The greater part of these non-parochial registers, according to the testimony of the Commissioners for inquiring into their state, have been made and preserved with great accuracy and care, and, indeed, are superior in the important points of precision and fidelity to many of those which have been kept by the regular clergy. Probably additional care was bestowed on them, in consequence of the fact which, until a recent Act of Parliament, was fatal to their admissibility in Courts of justice, namely their unofficial nature. They all wanted the stamp of authority, and, as mere private documents, have, according to the well-established rules of evidence, been uniformly rejected. In an action for the use and occupation of certain property which had been demised to the defendant for a term of years determinable on three lives, an examined extract from the register of burials of a Wesleyan Chapel was tendered to prove the death of one of the *cestuis-que-vie*; but Park, J., said he could not receive the register as evidence of the death.(r)

So, on a petition for payment of a legacy, Sir T. Plumer, M. R., thought that a copy of an entry in the Register of Births kept at Dr. Williams's Library, in Redcross-street, was not evidence to prove the age of the petitioner that the Court could act on.(s) In the Ecclesiastical Courts the same rule prevails, a copy of the register of a Dissenting Chapel having been declared inadmissible as evidence.(t) It will be observed, that in all these cases the point actually decided was the inadmissibility of *copies* of registers of this description; but the objection would, in principle, have equally applied to the original, namely, that they were not public documents in official custody. The observation of Sir J. Nicholl, in the case last cited, that "the books  
[ \*510 ] themselves might be \*produced at the hearing of the cause, and be made evidence to a certain extent," cannot be considered as an authority for saying, that they would be evidence *quæ* registers. It is presumed that the learned judge contemplated such a use of the books, as Lord Eldon, in the case of Lloyd v. Pas-singham,(u) suggested might be made of Fleet registers. He gave no opinion that the Fleet Register was evidence as a register; but he

(n) See evidence of Mr. Goldsmid, Par. Reg. Rep. Min. Ev. 22, 23. (o) Ante, p. 248.

(p) Lawrence v. Deacon, Peake, 136. See Doe v. Lloyd, 1 Esp. 215; Peake, 231.

(q) Doe v. Gatacre, 8 Car. & Pay. 579, (34 E. C. L. R.)

(r) Whittuck v. Waters, 4 Car. & P. 376, (19 E. C. L. R.)

(s) Ex parte Taylor, 1 Jac. & W. 483.

(t) Newham v. Raithby, 1 Phil. 315, (1 E. Ecc. R.)

(u) 16 Ves. 63.

was not prepared to say, that it might not be received as evidence of a fact; and he could suppose cases in which such evidence might be received. "Upon a question of pedigree," said his Lordship, "would not that entry be admitted, not as a register, but a declaration under the hand of the party?" And his Lordship seems to have considered the Fleet Register as admissible to that extent, and to have given weight to it accordingly. This seems to be the utmost extent to which registers of this nature could be admitted; and authorities are not wanting for the position, that even this is too great a concession, in the case of books of such a character as the Fleet Registers. In the case of *Reed v. Passer*,<sup>(v)</sup> Lord Kenyon expressed himself strongly of opinion that such books were no evidence, and in a late case Mr. Justice Patteson, though pressed with the observations of Lord Eldon in *Lloyd v. Passingham*, said he should not receive the Fleet Register in evidence for any purpose whatever.<sup>(w)</sup>

It is observable, that these Fleet Registers contain in themselves abundant grounds for impeaching their credit, without establishing a general rule, that no non-parochial register, however untainted can be received as evidence of declarations of the parties. The question is now, however, of importance only with respect to documents of that nature, which have not been made evidence under the provisions of the stat. 3 & 4 Vict. c. 92. In one case a Quaker's register was received. This was in the case of an action for criminal conversation with the wife of the plaintiff. The plaintiff and his wife were both Quakers, and the marriage had been performed, according to the ceremonies of the sect, by a public declaration of the parties, at a monthly meeting of the society, of their becoming man and wife, and a certificate to that effect, was entered in a register [ \*511 ] signed by the parties, and by several subscribing witnesses. The register was produced, and proved by one of the witnesses, and a member of the society proved the forms observed to be those usually considered as amounting to marriage amongst Quakers. The proof was received without objection.<sup>(z)</sup>

The principle of this case is not clearly intelligible: unless it was considered that the entry in the register, and the signatures of it by the parties, formed part of the *res gestæ* constituting the marriage: in which case, the admission of one of the witnesses to prove the register would be in analogy to the regular practice of proving a deed by a subscribing witness.

By the act 3 & 4 Vict. c. 92, a most important alteration has been made in the law of evidence with respect to the various non-parochial registers above enumerated. By the first section, the Registrar-General of births, deaths, and marriages in England is directed to receive and deposit in the general register office all the registers described in the Act, and all others delivered within three calendar months from the passing of the Act. Section 2, after directing the Commissioners for inquiring into the state of the non-parochial registers to inquire into the authenticity, &c., of every register sent to them within three months, directs that such of them as shall be certified under the hands and seals of three or more of the commissioners shall

(v) *Peake*, 303.

(w) *Doe v. Gatacre*, 8 Car. & Pay. 579, (34 E. C. L. R.)

(z) *Deane v. Thomas*, 1 Mo. & Ma. 361.



be received by the Registrar-General, and deposited with the rest. Section 4 directs how the registers are to be identified and authenticated under the hands of the Commissioners. Section 6 declares that all registers deposited with the Registrar-General by virtue of this act (except the Fleet and King's Bench prisons, May Fair, and Mint Registers,) shall be deemed in legal custody, and shall be receivable in evidence in all Courts of Justice, subject to the provisions hereinafter contained. By section 8, wilful injury or forgery of registers is made felony. Section 9 directs all extracts from the registers to be sealed or stamped with the seal of the office, such [ \*512 ] extracts to be evidence without production of the originals, \*subject to provisions hereinafter contained. Section 11 enacts, that extracts so certified may be received in evidence after such notice given as therein prescribed of the intention to use such evidence, in any Court of law in England or Wales, in any matter not a criminal case. Section 12 requires the same notice to be given if the original is to be used. Sections 13 to 17 inclusive, regulates the admission of the said registers, and in the Courts of Equity, Master's Offices, Ecclesiastical Courts, and in Criminal cases. Section 20 directs the Fleet and King's Bench, May Fair, and Mint Registers to be transferred to the custody of the Registrar-General, with a proviso that none of the provisions respecting the registers made receivable in evidence by this Act shall extend to them. The other sections contain regulations as to the mode of keeping the registers, the fees to be paid, and other matters of detail for carrying out the intention of the Act.(y)

Under this statute, about ten thousand volumes of registers of different descriptions have been authenticated, and are deposited in the Registration Commission Office in Roll's Yard. This number comprises the registers of the various denominations of Dissenters Foreign Protestants, Quakers, Scotch Churches in England, Methodists, the books from Dr. Williams's Library, Paternoster-row, and numerous Cemeteries, and those from Roman Catholic Chapels of about one-third of England.(z)

A complete list of all the non-parochial registers so deposited with the Registrar-General under the above Act has been printed; by reference to which access to any particular register may be readily obtained. The index contains the names of the counties of England and Wales alphabetically arranged, and in each county the names of the places from which registers have been received in like order; in separate columns are stated the denomination and date of foundation of the congregation to which the register belonged, the name of the minister by whom the register was deposited, the number of books deposited from each place, \*the nature of the entries [ \*513 ] therein, and the period over which each book extends.(a)

Searches and extracts from the registers and records which have

(y) See the act itself in the Appendix.

(z) See 9 Car. & Pay. 793, (38 E. C. L. R.) The residue of these Roman Catholic Registers remain at the chapels to which they relate, and those of the Jews at their various synagogues.

(a) A short summary of the different sects whose registers have been sent in, and of the dates from which they have been kept will be found in the Appendix.

been deposited in the custody of the registrar-general, pursuant to the act, will be granted on every day, except Sundays, Christmas day, and Good Friday, between the hours of ten and four, upon personal application and payment of the legal fees, at the non-parochial register-office, in the Roll's Yard, Chancery-lane; but application by letter for search or extract cannot be complied with.

### \*CHAPTER III.

[ \*514 ]

#### FOREIGN REGISTERS.

THERE is a class of non-parochial registers which have been already mentioned,(a) and which, though not brought within the provisions of the 3 & 4 Vict. c. 92, are, nevertheless, admitted as evidence under certain conditions. These are, the registers of baptisms, marriages, and burials, solemnized according to the forms of the church of England in the territories of the East India Company in India, and at the island of St. Helena. Duplicates of these registers are transmitted to the India-house, where they are preserved in the secretary's office. They are sent from Bombay, Bengal, Madras, and St. Helena; those of the out-stations being forwarded to the respective presidency to which they belong for the purpose of transmission to this country. The duplicates from Bombay commence in 1709, and come down to 1837; from Bengal in 1713 to 1837; from Madras in 1698 to 1834, and from St. Helena, in 1767 to 1835;(b) and they continue to be transmitted up to the present time. They are of paper, bound in volumes, and each duplicate is signed by the officiating clergyman.(c) It has been stated that these books are admissible in evidence; it is however necessary that they should be proved to come from the proper custody, by production in the hands of some officer of the India-house.

In the Molesworth Peerage case, to prove the deaths of John and Richard Molesworth, there was produced from the India-house, by a clerk in the secretary's office, two volumes of burials of persons in the East India Company's service at Bombay in 1753 and 1793, which had been duly transmitted from that \*settlement. They [ \*515 ] contained entries of the burials of John Molesworth, [ \*515 ] writer, and ensign Richard Molesworth, and their deaths were admitted to be thereby proved.(d) In the Gardner Peerage case, as we have seen, some additional evidence was required,(e) namely, proof that the duplicate register had been transmitted to the India-house in the usual manner, and that the clergyman by whom it was signed had actually officiated at Madras at the date of the marriage.(f)

There are also preserved at the East India House, the certificates of baptism of such persons as have proceeded to India in the Com-

(a) *Supra*, p. 366.(b) *Rep. on Reg.* p. 13.(c) *Grimaldi Orig. Gen.* 329. *Burn on Par. Reg.* 197. (d) *Printed Ev.* pp. 21. 24.(e) *Supra*, p. 366.(f) *Le Marchant's Rep.* p. 6. *Printed Ev.* p. 97.

pany's service, who are generally required on setting out to prove their age by the production of those documents.(g)

Registers have been kept by the clergymen attached to the British embassies and consulates, and of various English congregations in places not under British dominion, of the marriages, baptisms, and burials performed by them. No uniform course has been pursued with respect to the preservation of these books. Many of them have been transmitted to this country, and are now deposited in the registry of the Consistory Court of London. In addition to these, the bishop has also a general register, which was commenced in 1816,(h) in which the births, marriages, and deaths of British subjects occurring in foreign countries may be registered. With respect to these registers in the Consistory Court, the commissioners have reported that they may be divided into three classes.

1. The first class consists of certificates of baptisms and marriages, bearing the signatures of the parties and witnesses, (with few exceptions,) and authenticated by the British envoy or minister [ \*516 ] \*as having been performed in his house, and from time to time sent through the Foreign Office to the Registry. In this class may be included registers from Oporto, from 1706 to 1802; from the Cape of Good Hope, Gibraltar, and Geneva. These are original books, in which the entries are signed by the parties and authenticated by the chaplains.

2. The second class consists of transcripts from original registers, certified by the ministers of the different places, in the same manner as transcripts under the 52 Geo. 3, c. 146, for the regulation of transcripts deposited with the registrars of the different dioceses. A book of transcripts also from the register kept at the British embassy in Paris, from 1816 to 1833, and continued to the present time, and a transcript of the register of St. Petersburg, from 1706 to the present time.

3. A book of registers transmitted from Cronstadt, which appears to have been transcribed, but not certified as such, forms the third class.(i)

With respect to these registers deposited in the Consistory Court, no case has been met with expressly deciding the question whether or not they would be admissible as registers to prove the facts recorded in them. It seems difficult to draw any sound distinction in principle between the transcripts preserved at the India House, which, as we have seen, are admitted when produced by an officer of the house, and these certified registers, many of which, it must be observed, are original documents. The original books in both classes of registers under consideration, have, in the majority of instances, been kept in conformity to the practice established with respect to parish registers

(g) Lists are occasionally published in England by order of the registrars of the supreme courts in India, of persons to whose estates letters of administration having been taken out by the registrars under acts of parliament, a surplus has remained in the hands of the administrator. These lists, if not evidence of the death of the persons named in them, will afford information on the subject.

(h) There are a few entries of earlier dates.

(i) Rep. on Reg. p. 11, and see Appendix thereto (M). In the Appendix to this Report more particulars are given as to these different registers, the places from which they have been sent, the dates, &c.

in England, although not by virtue of the authorities which regulate that practice; and the transcripts have in like manner been certified, and transmitted, and are now deposited in the hands of public functionaries. There seems, therefore, no reason for refusing to the one class that credit which \*is conceded to the other. Neither of them, it will be seen, is affected by the provisions of 3 [ \*517 ] & 4 Vict. c. 92.(j)

The above reasoning will not of course apply to the certificates sent home and registered in the Bishop of London's Court: which, however, as well as the original registers and transcripts, where they are signed by the parties, or the relations of the parties respecting whom any fact is certified, may be used as evidence of declarations, subject to the established rules regulating the admission of evidence of that nature.

It appears, that in Scotland at this day, as formerly in England, parish registers are kept by virtue of ecclesiastical authority. In the directory for public worship, a book of authority in the church of Scotland, injunctions are contained respecting them. In another book also, which is considered of authority in explaining the practice, and sometimes the law, in ecclesiastical matters, directions are given for keeping a register of baptisms.(k) The law is represented as rather vague on the subject; and apparently the practice partakes of that want of precision. From the testimony of many witnesses it appears, that the state of parish registers in Scotland is even less satisfactory than it is in England. The Population Abstract of 1801, states that out of eight hundred and fifty parishes in Scotland which made returns to government, only ninety-nine had regular registers, while the rest had either no register at all, or only occasional entries. The report of the Deputy Clerk Register of Scotland to the commissioners of public records in 1810, speaks to the want of care which has been displayed in the formation and custody of these useful records;(l) and the testimony of private writers is to the same effect. Some of the evidence given before the committee on parochial registration, might indeed at first sight seem inconsistent with these statements, but it will be found upon examination that the practice with respect to registering, as described in that evidence, is such as would \*naturally lead us to [ \*518 ] expect inaccuracy and deficiency in the registers.(m)

The registers both of marriages and births are kept by the session clerk for the time being, and on his death or removal from office are delivered to his successor by the minister and session. The registration is not compulsory; if the parent of a child wishes to have it registered, he applies to the session clerk, who from his information enters the circumstances necessary to be registered. So it is with respect to marriages. Either one of the parties, or a friend informs the registrar of the particulars, the time, and place of the intended marriage, and the name of the minister who is to officiate; this infor-

(j) See the Appendix.

(k) Stewart's Collections, &c. of the Church of Scotland, tit. 4. See Par. Reg. Min. Ev. 128.

(l) Burn on Par. Reg. 170. Sinclair's Statistical History of Scotland cited by him. See also Preliminary Observations to Population Abstract, 1821, p. xxi.

(m) Par. Reg. Min. Ev. p. 128.

mation being for the purpose of proclamation, is given before the marriage has taken place, nor does it appear that in general any further registration is subsequently made; and as many marriages take place without proclamation, there are many which are never registered at all.

It is said that a somewhat stricter practice prevails in Edinburgh, and that there, on a person applying respecting his marriage, for proclamation, a prepared card partly printed is given to him, the blanks of which are filled up at the time of the marriage; it is then subscribed by the minister and some witnesses, and afterwards returned to the session clerk, who thereupon completes the registration.(n)

It is obvious that a registry conducted on such lax principles, is not much to be depended upon, and there seems much justice in the remark which has been made, that the system in Scotland now, is the worst possible.(o)

No distinction is made between members of the established church, and those of the secession church of Scotland, in respect to registration: it being in fact looked upon rather as a civil than an ecclesiastical operation.

[ \*519 ] \*It appears that in Scotland there is not in general any parochial register of deaths or burials.(p) Few registers of this description are to be met with of a date earlier than the commencement of the present century, although occasional entries may be found in former years.

Thus it is stated that in the parish of Kilmoruck, Invernesshire, there were only two entries of deaths for upwards of a century, and down to 1825, no register of deaths was kept, though the baptisms and marriages were regularly kept and continued since 1674.(q) In the parish of Urray there was no register of deaths at all.(r) The session clerk of Bonhill,(s) in the county of Dumbarton, proved that there was no register of burials in that parish kept before ten years prior to 1820, the date of his examination.

It would seem from one case that the session books are not considered of undoubted authority in the Scotch courts. A certified extract of baptism from a session book was tendered to prove minority: but the lords refused it on two grounds; first, that the register was not of that authority that the extract ought to make faith *per se*: secondly, on the obvious ground that the child might have been one or more years old at the time of baptism.(t) There is no doubt however, that these registers are admissible evidence, on the same footing as English registers, and have been treated as such: in fact, as we have seen, the House of Lords has relaxed in their favour, the rule established in peerage cases to call for the production of the original books,(u) an indulgence, which it will appear, has also, perhaps of necessity, been extended to the registers of foreign countries.(v)

(n) Ibid. pp. 129, 130.

(o) Burn Par. Reg. p. 171.

(p) Par. Reg. Rep. Min. Ev. p. 128.

(q) Lovat Barony, Min. Ev. 65.

(r) Ibid. 71.

(s) Airth Earldom, Min. Ev. 143.

(t) Wilson v. Aitken, Dictionary of Decisions, vol. 30, 12700. Thomson v. Stevenson, Ibid. 12701.

(u) Supra, p. 28.

(v) See Hunsden and Galmoy Peerage cases, cited post, p. 526.

Provision has occasionally been made in acts of parliament for establishing registers in particular places.

\*Thus by stat. 58 Geo. 3, c. 84, which declares valid [ \*520 ] marriages in India by clergymen of the church of Scot-land, it is provided that the officiating minister should at the time of solemnization certify every such marriage by a writing subjoined to or indorsed upon a declaration by one or both of the parties of membership of the church of Scotland; specifying in such certificate the names and descriptions of the parties, and of the witnesses to the marriage. It is also provided that such certificate in duplicate should be signed by the parties and witnesses, and that the minister should deliver one duplicate to the persons married, or one of them, and should transmit the other duplicate to the chief secretary of government at the presidency under which the marriage should take place.

So also, the 5 Geo. 4, c. 68, provides for the registration of marriages in Newfoundland by ministers of churches and chapels, and the delivery of certificates of those celebrated by licensed teachers, and their registration by the secretary to the governor, and enacts, that the register, or an attested copy shall be evidence of the marriage.

In most, if not in all, European countries, some system of registration, either ecclesiastical or civil, has long prevailed. The importance of the subject seems to have been in general more fully appreciated amongst the continental nations than in this country, if we may judge from the greater amount of care which has been taken to guard against the loss or falsification of the registers, and the higher degree of particularity and precision in forming them, which is required by many of those nations. Perhaps upon the whole, the system of civil registration pursued in France under the code of Napoleon, will be found to secure at once the fullest information, and the most perfect fidelity.

In every parish in Spain the vicar or curate, or if there be none, the rector, is charged with the care of the parochial archives.(w) It does not appear by what authority the parish registers are kept there, but there is a place in the parish church for the purpose, [ \*531 ] and a clerk appointed to inscribe the names in the books, each of which has an alphabetical index. The entries of marriages contain the date, the name of the officiating minister, the name and place of birth of the husband and wife, and the names and place of birth of the parents of each of them, together with the names of the sponsors and witnesses. The entries of baptism contain the name and sex of the child, the names and places of birth of the parents, and the names of the sponsors. The register of death contains the name, age, birth-place, and parentage of the deceased, the day of death, place of residence, whether married or single, and to whom married, and whether testate or intestate.

In France the registration of births, deaths, and marriages is committed to the civil power, and great care is taken to ensure the accuracy of those records. The law on the subject is laid down in the code civil.(x) The entries contain more particulars than is required in most other countries. Thus the registers of marriage in addition to

(w) Par. Reg. Rep. App. No. 8, p. 152.

(x) L. 1, tit. 2, ss. 34 to 101, inclusive.

the name, condition, day of birth, residence, and parentage, of the parties, contain also the statement of the age of the parents, if living, their residence, and their presence at, and consent to the marriage; the preliminary *actes* are then recorded; then follow the names, ages, descriptions, and residences of the witnesses, the signatures of the parents, and that of the magistrate. The registers of birth mention the name of the child, the place, day and hour of the birth, the names, descriptions, ages, and in the case of natural children, (which are registered as such,) the birth places of the parents. The registers of death record the name, description, age, day and hour of death of the deceased, and, if a married person, a particular description of the survivor. In the cases of births and deaths the parties on whose information the entry is made, including generally in the former case the midwife who attended, sign the register; if any witness cannot write it is so stated; in all the registers a full description of the witnesses including their ages is added, and the entries are attested by the signature of the magistrate before whom the declaration is made. If any mistake or erasure occurs, it is noticed in the margin or at the bottom [ \*522 ] of the *acte*. The books themselves are \*guarded from the possibility of falsification by an entry in each, stating the purpose for which it is kept, the number of leaves in it, and other particulars, and signed by a *Juge* or *Président du Tribunal*.(y)

Under this system the utmost security is obtained both for the due entry of all matters required to be recorded, and for the faithful preservation of the registers themselves. A marriage is not complete until the parties have made the prescribed declaration in the presence of the magistrate, whose duty it is to register the marriage, and the signing the register by the parties is one of the necessary formalities: thus the due registration of every marriage is satisfactorily provided for. All necessary information respecting births and deaths, which from the less public nature of those events would be more likely to escape the knowledge of the civil authorities, is ensured by penalties imposed on those who neglect to give the information required within a certain time after the event has taken place. The time fixed for this purpose is twenty-four hours.(z)

On the occupation of the Netherlands by the French, the system of registration established by the code civil was introduced into Belgium, and now prevails there. After the revolution of 1830, some efforts were made to return to the old system of clerical registration, but the attempt gave general dissatisfaction, and was in consequence abandoned.(a) It seems that the officers whose duty it is to keep the registers, are not only subject to heavy penalties at the hands of the government for any neglect, but are also liable to civil actions at the suit of any person who may have been injured by omissions or

(y) This entry is as follows:—*Département de la Seine, Ville de Paris, 1<sup>er</sup> Arrondissement Municipal. Register double des actes de Mariage. Le présent registre, contenant "vingt" feuillets, pendant l'an "1830" à inscrire les actes de "mariage" du "premier" arrondissement Municipal de Paris, à l'effet de quoi il a été coté par premier et dernier, et paraphé sur chaque feuille, conformément à l'article 12 du code civil, par moi sousigné. "A. B." Président du Tribunal de 1<sup>re</sup> instance du Département de la Seine. Paris, le 18 . Signé, "A. A."* See *Par. Reg. App. 10*, p. 158, where also are given forms of entries in the registers.

(x) *Evidence of Mr. Finlaison, Ibid. p. 59.*

(z) *Ibid. of M. Quetelet, Ibid. p. 117.*

alterations in the registers, although the author of the injury may be unknown.(b)

\*The same system is followed in the state of Geneva. [ \*523 ]  
va.(c)

In the Rhenish provinces of Prussia also, the practice is the same as in France, the registration being conducted according to the provisions of the French code civil: but in the other parts of that kingdom, the law has committed it to the hands of the clergy. The church registers are kept by the pastors, whose duty it is to enter therein the marriages, births, baptisms, and burials performed by them, or of which they have received notice, immediately after the performance of the ceremony, or the receipt of the notification. It appears that a duplicate of the register is kept, which is annually collated with the register by the pastor, who certifies its accuracy: and it is then deposited at the tribunal of the place. In registering a marriage it is required to state the names, surnames, and ages of the parties; whether they have been married, and whether they are under the authority of parents or guardians; if so, how and when the consent of the parents or guardians to the marriage has been signified. The name, rank, and residence of the fathers is also stated. The baptismal registers record the name of the child, the day and hour of its birth, from the information of the parents or midwives, whether it is legitimate or not, the names, rank, and residence of the parents, and names of the witnesses to the baptism. In registers of deaths, to the name, surname, and condition of the deceased, is added in the case of children those of the father: the age in years, months, and days, the fact whether the deceased has left a wife and children, and the day and hour of death, the disease which caused it, and other proofs by which the clergyman was satisfied of the identity, all find a place in the entry. The name of the officiating clergyman, and the date of the ceremony is added in registers of every kind. Parents who neglect to baptize a new born child within six weeks, are liable to be proceeded against as of unsound mind: with this exception, and that of the measures of police in cases of violent death, the law gives no coercive means by which registration of baptisms, marriages, or burials may be compelled; but it imposes on the clergyman, under penalties varying in severity, the obligation of registering those acts when they do take place. The registers \*of the Jews in Prussia are kept, [ \*524 ] where there is a synagogue, by the rabbins, under the control and inspection of the local administration: where there is no synagogue the duty falls on the local police. It seems that these Jewish registers are recognised by the judicial tribunals.(d)

In the Austrian dominions the registers are kept by the ministers under the authority of an imperial order of the emperor Joseph 2, dated February 20th, 1784. This order directs that each minister shall keep three registers of his parish, one for marriages, another for births, and a third for deaths. It then prescribes the form of the registers and the items to be contained therein. The year, month and day of the

(b) Ibid. App. 24, p. 187.

(c) Par. Reg. Rep. App. 21, p. 179.

(d) Par. Reg. Rep. App. No. 9. A. B. C. D. p. 153, to which the reader is referred for more particular information and forms of these entries.



marriage, the number of the bridegroom's house, the surname, Christian name, religion and age of the parties, and also whether they have been previously married, the names and condition in life of the witnesses, form the items required in marriage registers. The particulars respecting the parties are to be entered by the person who performs the ceremony, who is in all cases to sign his name; and each page of the register is further to be signed at the foot by the minister. With respect to births, it is required that the year, month and day of the birth, the number of the house, the Christian name, and sex of the child, and whether it is legitimate or not should be stated; in addition to which also must be mentioned the names and religion of the parents, and the names and condition of the sponsors; the witnesses of marriages, and the sponsors at baptisms are required to sign the registers, or, if they cannot write, to make their mark. The registers of death are to state the year, month and day of the death, the number of the house, the name, religion, sex, and stated age of the deceased; and in some cases the malady which caused the death. Bishops on every visitation of their dioceses are obliged to call for the production of the registers, and the provincial authorities are required to ascertain whether they are kept in all places according to law. The mode of ascertaining the truth of statements respecting the parentage of children made for the purpose of registration, has been the subject of very [ \*525 ] particular instructions to the clergy, especially respecting the distinction between legitimate and illegitimate offspring.(e) It does not appear whether the observance of these requisitions is enforced by any penalties; nor has any information been produced as to the actual state of the registration in that country.

In the Canton of Berne the baptismal registers appear to be kept with considerable particularity. They contain the names of the parents, and of the father's father, the place and date of their marriage, the name of the child, date of the birth, and names of the sponsors. In the cases of illegitimate children, the father's name is omitted and the fact of illegitimacy stated. Separate registers are kept for the baptisms and deaths of the citizens of the towns of Berne. No distinct register of births is kept. The marriage registers apparently contain very few particulars besides the date; merely the names of the parties, the husband's profession, and the name of his father are entered. Burial registers again are more precise. The date of the death, as well as of the burial, and the age of the party even to months and weeks are recorded, as well as the name and surname, residence and profession of the deceased, or if an infant then of his father; if illegitimate, the mother's name alone is mentioned; in the cases of married women their maiden name is added to that of the husband.(f)

It is said that parish registers are kept with great regularity in Holland.(g)

The Scotch church at Rotterdam has a register containing entries of the baptisms, &c., of many of those who fled from Scotland during the persecution of 1685.(h) The parish registers of several cities and

(e) Par. Reg. Rep. App. No. 23, p. 182.

(f) Ibid. p. 181.

(g) Carr's Tour.

(h) The following is one of the entries from this register:—"1687, Aug. 21. Jean Couper, da. to Mr. Patrick Couper and Janet Haliburton. Witnesses, Masters Alexander Hasty and John Harvey." Burn on Par. Reg. 197.

towns in Holland, Germany, and Switzerland, also contain many entries relating to the families of British subjects who at the several periods of religious persecution, have fled to foreign parts, and in particular to \*Rotterdam, Strasburg, Zurich, Basil, Geneva, [ \*526 ] and Frankfort. At the latter place there were in 1555, Sir John Chub, Sir Richard Morrison, Sir Francis Knollys, Sir Anthony Cook, Sir Peter Carew, Sir Thomas Wroth, Dame Dorothy Stafford, Dame Elizabeth Bukley, and the wife of Bishop Hooper.

In the Island of Guernsey, registers of births and baptisms, marriages and burials are comprehensive in the particulars and kept with regularity. In registers of baptisms the maiden name of the mother, and the names of the godfathers and godmothers, with occasionally the degree of relationship (if any) in which they stand to the child, are given. In those of marriages, the names of the fathers of the parties frequently occur.

It is apprehended, that wherever registers of this nature, whether civil or ecclesiastical, have been kept under the sanction of public authority, and are recognised by the tribunals of the country as authentic records, properly certified copies or extracts from them would be held admissible in our Courts in the same character. This seems to be the rule which the *comitas gentium* would dictate: and though no express authority to that effect has been met with, this principle seems fairly deducible from the cases which have occurred. Some of these have been mentioned in a former page,(i) where this branch of the subject has been partially treated.

In support of the claim of Wm. Ferdinand Carey to the Barony of Hunsden in the year 1707, an extract from a register of baptisms of the Netherland church at Maestricht was put in, and appears to have been admitted, to prove the parentage of the claimant, whose claim was allowed.(j)

In another case a certificate of burial from the parish of St. Paul, Paris, stating the death of Piers, Lord Viscount Galmoy, was produced and proved before the Lords' committee. In the same case five extracts from the registry of the town of St. Germaine [ \*527 ] \*en Laye, of baptisms and burials of several members of the family were received.(k)

So in the Slane Peerage case, to prove that Helen or Ellen Fleming died without issue and unmarried, an examined copy of an entry in the register of funerals of the parish church of St. Sulpice in Paris, together with certain notarial acts respecting the register in which she was described as having died "fille," proved to be a true copy by the person who took it, was given in evidence without objection.(l)

In the proceedings in the King's Bench against Sir Thomas Picton upon an indictment for having, when governor of the island of Trinidad, caused the torture to be administered to Louisa Calderon, a free mulatto, a copy of an entry of baptism in that island, when under the Spanish dominion, was put in evidence to shew the age of the plaintiff.(m) A great deal of evidence was taken in the island by virtue of a mandamus from the court of King's Bench. The return to the man-

(i) *Supra*, p. 365.

(j) Harl. MS. 6694.

(k) Galmoy, P. C. Report of Attorney-general, Lynch, 281.

(l) *Slane Barony*, Min. Ev. 33.

(m) *How. State Trials*, 262.

damus was signed by the then governor. The return contained a translation of two entries of the baptism of Louisa Calderon, from the register of the island, and also the examination of the curate who had made the entries. The vicar-general of the island was also examined as to the mode in which the register ought to be kept.(\*) From his evidence it appeared, that in that particular case there were considerable irregularities in the entries, and in fact he impeached the credit of the register: it does not seem however, that any objection was taken to the admissibility of the extract.

[ \*528 ]

## CHAPTER IV.

## REGISTERS OF PUBLIC OFFICES, CORPORATIONS, COLLEGES, ETC.

ANOTHER class of registers from which genealogical information may be obtained, and which from their public or official nature are in some cases admitted in evidence, consists of books kept in the various government offices, and other establishments, in the course of official duty or under the authority of Acts of Parliament.(o)

At the War Office the muster rolls and pay-lists of the several regiments are preserved, which shew the existence at the time of the persons named in them: there are besides miscellaneous documents, from which the fate of officers can frequently be traced so far back as 1668. There are less facilities for tracing private soldiers, but information respecting them may be obtained with tolerable accuracy from 1798, and occasionally from earlier periods.

From the year 1830, the ages and marriages of officers, and the baptisms of their children have been reported to the War Office; but no register is kept of their wives or widows, except of such of them as obtain pensions.

A record of the marriages of soldiers and of the baptisms of their children has been kept in each regiment since 1816, but this only applies to those who have married with the knowledge and consent of the commanding officer.

By the annual Mutiny Acts it is provided, that all recruits enlisting [ \*529 ] \*for the Queen's, or East India Company's military service, or the marine corps, shall be taken before a justice of the peace, who is to put certain questions to them, including amongst others, inquiries as to the name, birth-place, age, trade or calling of the recruit, and whether he is married or single. The answers are to be taken in writing on the oath of the recruit, and signed by him; the justice is also required to sign a certificate to that effect, a duplicate of which is given to the recruit.

It is one of the duties of the Secretary of War to answer inquiries as to the existence, &c., of officers and soldiers.

In the *L'Isle Peerage* case,(p) in order to prove the death of Michael Dillon, the father of the claimant, an examined copy of the pay-list

(\*) Ibid. 441.

(o) Phil. &amp; Am. Ev. 597.

(p) Min. Ev. p. 23. See also *Roscommon Earldom*, Min. Ev. p. 57.

of the county of Dublin militia in the Military Pay Office at Dublin, in which he was stated to have been killed in the battle of Ross, 1798, was admitted in evidence; the Attorney-general submitted that the original book should be produced, but the copy was admitted *de bene esse*.

The East India Company also are in possession of muster rolls and army lists of their armies, from which the same sort of information may be obtained as from the documents at the War Office. East India registers containing much of the information supplied by the above documents have been published annually from 1795. Baptismal certificates also of persons proceeding to India in the service of the Company are preserved at the India House.

In the year 1838 was published an alphabetical list of the names of the officers of the Indian army, with their respective dates of promotion, retirement, resignation or death from the year 1760 to the year 1837, whether in India or Europe.

It appears that no regular series of records of the fate of officers and men in the naval and marine services is kept at the Admiralty. Individuals may, however, sometimes be traced by means of different pay-lists, and the books of the ships in which they may [ \*530 ] have been serving from time to time. The more modern documents of this description are kept in the office of the Accountant-general of the Navy at Somerset House. Those of an older date are at Deptford. Many records connected with the navy from the time of Car. 2, have lately been deposited in the Tower.

On an indictment for forging a will, it appeared from the evidence of the clerk of the Ticket Office in the Navy Office, that it was the custom for captains of men-of-war to transmit accounts of their crews to the Navy Office as frequently as possible, and that those accounts were entered regularly in muster-books, containing the names of all who were living, dead, or run away. The muster-book belonging to the Flamborough was produced, in which there was this entry: "John Thompson, an able seaman, died 22nd August, 1739, at Turtle Bay, on board the Flamborough." This was admitted as evidence of the death and identity of the supposed testator.(g)

The book kept at the Sick and Hurt Office, in which are copied the different returns made by officers of the navy of persons dying on board, has been held evidence to show the time of a seaman's death.(r) But an entry in the muster of a person of the same name is not sufficient evidence that an individual was living at the time.(s)

The baptismal certificates of the students who were admitted to the Royal Naval College at Portsmouth, established early in the last century, were until the abolition of that establishment in 1836, transmitted to the Admiralty, and it is believed were preserved among the records of that office: but although the officers of that department will give what information is in their power concerning persons connected with the service, the means of preserving such information for the use of the public, seems never to have formed part of the regular objects of the office, and there are consequently no facilities for obtaining it. It

(g) *Rex v. Rhodes*, 1 Leach, C. C. Ed. 3, 29. *Rex v. Fitzgerald* and see *ib.* 24. Bul. N. P. 249, a.

(r) *Wallace v. Cook*, 5 Esp. 117.

(s) 3 Esp. 190.

is believed there are at the Admiralty no records of a genealogical nature of an older date than the latter end of the last century.<sup>(t)</sup> The office for payment of widows' pensions will afford some information as to the deaths of the persons whose widows have been in the receipt of pensions; and as proof of the marriage is required, before the grant of a pension is made, the same office may afford the means of establishing that fact also.

Inquiries may also sometimes be usefully prosecuted at the office of Inspector of Seamen's Wills, in the Navy Pay Office, to which are sent certificates, petitions, and other documents rendered necessary by the Acts, 55 Geo. 3, c. 60, and 11 Geo. 4, and 1 Wm. 4, c. 20, for obtaining probate of the wills, or administration to the effects of deceased seamen and marines in Her Majesty's service.<sup>(u)</sup>

Returns are regularly made to the Home Office from the different penal colonies, of the convicts living at the dates of the returns, and of their places of residence. On application at the Home Office a certificate will be granted of the existence and residence of any convict at the time of any return. The certificate is in the following form:—"Secretary of State's Office. Home Department, Whitehall, 18th August, 1835. Upon reference to a return of convicts in New South Wales made up to the 31st December, 1834, it appears that Richard Evans, who was convicted at Montgomery, and transported to that colony in the ship Elizabeth, in 1820, was on board the Phoenix hulk at Sydney."

Where the surviving *cestui que vie* in a lease had been transported in 1787 for fourteen years, and it appeared from the register kept at the Secretary of State's Office, that at the last muster in 1806, a person of the same name was living in New South Wales as a free British settler, and it also appeared from certificates of persons resident in New South Wales, dated in 1816, that he was then alive, the Court of

[ \*532 ] Chancery in 1818 granted \*a commission to examine witnesses as to the fact and identity of the person.<sup>(v)</sup>

At the Excise Office and Custom House registers are kept, which shew the time of the appointment and discharge, or death, of every person in the service of those departments, and also the places where they were employed. In a case in practice, the family of an exciseman, who was a Dissenter, established their claim principally by means of the books from Broad-street, shewing that their father was stationed at the several places where their births had taken place.

The registers of public hospitals will furnish the date of the admission and discharge of patients, and of the deaths of such as died whilst they were inmates. Except in the case of some few, in general the most ancient, which have burial grounds attached to them, it is the practice to inter deceased inmates in the burial ground of the parish where the hospital is situate, and an entry of their burial will of course be found in the parish register. Some exceptions, however, occur when the friends of the deceased claim the body and bury it where they please.

(t) Additional MSS., British Museum, No. 9294—9339 contain a number of official documents relative to the navy from 1558 to 1782, purchased from Duckett; Nos. 9336—9339 are lists of the royal navy from 1546 to 1714, and from 1751 to 1782.

(u) See post, chap. 10.

(v) *Brown v. Petre*, 2 Swanst. 235.

By the Act relating to county lunatic asylums in England, 9 Geo. 4, c. 40, the returns of the patients are required to be transmitted to the Clerk of the Peace.

By the 2 & 3 Wm. 4, c. 107, a book of entry of patients is required to be kept by the keepers of licensed houses, a register by the Clerk of the Metropolitan Commissioners and Visitors, and an annual report to the Lord Chancellor to be made by public hospitals and charitable institutions. Among other particulars, these documents set forth the surname and Christian name, sex, and age of every patient, whether married or single, date of admission and discharge, or death.

The Legacy Office in London is supplied by the several courts exercising testamentary jurisdiction, with copies of all wills proved and certain particulars of all letters of administration granted there, \*and is also furnished by the Commissary Courts in Scotland with copies of all testamentary deeds recorded in [ \*533 ] such courts.(w)

It may happen that the relationship of a legatee is not mentioned in the will; but in this case, if it is within the degrees specified by the 55 Geo. 3, c. 184, for the increasing scale of duty, it will appear from the legacy receipt, in which the degree of relationship is stated for the purpose of shewing the duty to be paid, and being signed by the legatee it will be admitted on the footing of a declaration. The shares of next of kin are payable in the same manner by the administrator, who is required to take a similar receipt; the duty being, as in the case of legacies, proportioned to the degree of relationship. The same observation will apply to receipts for annuities, which contain the further particulars of the age of the annuitant.

The books of administrations at the same office will be more fully noticed in a future page.(x)

The notices which Bishops' registers contain of marriages, of widows' vows, of suits respecting legitimacy, are all of the greatest importance in gentilitial antiquities, relating, as when found in these registers they generally do, to persons in the superior ranks of society. Torre, who spent many years upon the York registers, has many valuable additions to Dugdale collected in them.(y)

The register of Archbishop Zouch, of York, was lost for many years; during that time a family of great consideration were at a vast expense in collecting proofs of their right to a very eminent dignity, all of which would have been saved had an early will, entered in that register, been known to them. The will is that of John Earl of Warren, and it completely sets at rest the long disputed origin of the Warrens of Pointon.(z)

Bishops' registers will also supply evidence in the form of the affidavits and bonds required for obtaining licenses to marry. [ \*534 ] \*From these it will appear whether or not either of the parties had been previously married. According to C. J. Abbott, however, there is not much weight to be attached to the description of "bachelor" and "spinster" in the affidavit and bond. That learn-

(w) Gwynne on Probate and Legacy Duties, p. 50.

(x) Post, chap. 10.

(y) Proceedings of the Record Commissioners, 1832-1833, p. 263.

(z) Ibid. pp. 191. 263.

ed judge said, "There is very little to be derived from it. You will find very few instances indeed where the first marriage is recited, and the second is said to be celebrated 'for and in assurance, &c.,' though it ought to have been so."(a) The documents, however, were received, and it is conceived the description is at least good as *prima facie* evidence.

The registers or obituaries in the chapels appendant to the several colleges are perhaps the most ancient in the kingdom; the old *liber obitulis* of Queen's College, Oxford, has entries of the reign of Edward III.(b)

The records of the universities and of colleges will afford much genealogical information concerning individuals who have been admitted as students in them. Thus at Trinity College, Cambridge, since the year 1810 the admission books contain entries of the date of admission, the rank of the admitted, his name, father's Christian name, native place, county, school, master's name, age, tutor. Previously to 1810 the name and rank of the student were alone recorded. The particulars of these entries vary in different colleges, but it is believed that in all the practice of recording some such particulars prevails.(c)

In the University of Oxford the admission of every student is registered in the books of the Vice Chancellor for the time being, and of course greater uniformity prevails in these University records, than in those of the several colleges. The present practice is to enter the Christian and surname of the student, his age, place of birth, father's name and description, and the student's place in the family, as first, second, or other son.

[ \*535 ] \*In addition to this register, which is called the Book of Matriculations, there is also kept a book entitled the Subscription book, in which the parties who are matriculated subscribe their names to the Thirty-nine Articles. Both these books were produced in the Tracy Peerage case, and admitted without objection.(d)

In Trinity College, Dublin, from an early period, the entries on admission appear to have been very full. For the year 1697, is an entry of the admission of John Goldsmith, an uncle of the poet, containing nearly the same particulars as those above stated to be at the present day required at Trinity College, Cambridge.(e)

In addition to the information above stated, the heads of colleges are in possession of the proofs of descent of such persons as have from time to time enjoyed the benefits noticed in a former page,(f) as belonging to the kindred of founders and benefactors of some colleges; but they are not in general forward to impart those proofs. It may, however, be proper to observe, that proof of lineal descent from the parents of some person who has enjoyed those benefits, is generally considered sufficient to establish the title of a claimant to the same benefits. The advantages of this consanguinity having rendered the

(a) Beer v. Ward, Printed Report of Trial, 2nd issue, p. 115.

(b) Grim. Orig. Gen. 247.

(c) The entries concerning the same individual have not always been consistent. See observations respecting the birth-place of Prior, as stated in three different entries in the books of St. John's College, Cambridge. Johnson's Lives of the Poets, vol. ii. 231.

(d) Tracy Barony, Min. Ev. 68.

(e) Prior's Life of Goldsmith, vol. i.

(f) See p. 430.

knowledge and proof of it important, various pedigrees have from time to time been published, which will assist in tracing it.

The pedigrees of families of kin to Archbishop Chichele, the founder of All Souls, Oxford, were published in quarto, in 1765,<sup>(g)</sup> with a supplement in 1775. Additional MS. collections are in the possession of Francis Townsend, Esq., Rouge Dragon Pursuivant. Manuscript pedigrees of founders' kin are in the Lambeth Library, and extensive collections, showing the kindred of Wykeham, and of Sir Thomas White (the founders of New College and St. John's College,) are in the possession of Charles George Young, Esq., York Herald. Genealogical information is also contained in Churton's "Founders of Brazen-nose, Oxford," 1800,<sup>(h)</sup> and Warton's "Life of Sir T. Pope," 1780.

\*The records of the different Inns of Court will afford [ \*536 ] information relative to the persons who have from time to time been admitted members of those societies from an early period. The admissions of William, third son of Lord Tracy, to the Middle Temple, in 1649, and of Robert, fifth son of Lord Tracy, in 1673, and of Robert and Richard, the eldest and second sons of the last-named Robert, in 1700 and 1708, were proved by the production of the admission books of that society.<sup>(i)</sup>

Among the Harleian MSS. in the British Museum are some transcripts of certain inquisitions relating to Gray's Inn, containing amongst other valuable matter, an alphabetical list of gentlemen admitted to that society, with the dates of their admission from 1521 to 1674:<sup>(j)</sup> tables of the admittances into Gray's Inn, declaring the names of the gentlemen, the town and county whence they came, and the day, month and year when admitted from the year 1626 to 1677:<sup>(k)</sup> arms and names of noblemen and knights admitted to the said society:<sup>(l)</sup> an alphabetical list of all persons called to the bar by the said society. This MS. is of singular importance, as it is presumed to be unique, all the early records of the society having been destroyed by fire.

Among the Lansdown MSS. in the same library, is a list of the names of benchers, associates, utter barristers, &c. of Lincoln's Inn.<sup>(m)</sup> There is also a similar list of the members of the Inner Temple and of the students of the several Inns of Court, apparently about the end of the reign of Elizabeth.<sup>(n)</sup>

The books of a public company are admissible in questions of pedigree, to shew the description by which a person was admitted into the company. The evidence is admissible, not on the ground of hearsay from members of a family, but as a part of an act [ \*537 ] done: \*that the company received the person by a certain description at a certain time.<sup>(o)</sup>

It may be presumed, that the books of the College of Physicians, the College of Surgeons, and the Hall of Apothecaries would be admis-

(g) *Stemmata Chicheleane*, Oxford, 1765.

(h) There is an account of the kinsmen of Bishop Smyth, and of Sir Thomas Sutton, the founders of Brazen-nose, in Churton's *Lives of Smyth and Sutton*, Oxford, 1800; and some notices of the family of Sir T. Pope, the founder of Trinity College, Oxford, may be seen in Wharton's *Life*, 1780.

(j) Harl. MSS. 1912, fol. 5.

(i) Tracy Barony, *Min. Ev.* pp. 70. 78. 81.

(k) *Ibid.* fol. 85.

(l) *Ibid.* fol. 102.

(m) Lansd. MSS. 106, art. 15.

(n) Lansd. MSS. 106, art. 17.

(o) Per Tindal, C. J., *Collins v. Maule*, 8 Carr. & P. 504, (34 E. C. L. R.)



sible on the same footing as those of the Corporation of London in the case last cited.

An admission book of freemen in the Corporation of Gloucester was put in evidence in the Berkeley case, containing the admissions of the sons of Earl Berkeley, in 1791, shewing that the claimant was not then called Lord Dursley.(p)

The admissibility of corporation books has been questioned,(q) and in one case they were rejected as evidence of the rights of the corporation against strangers:(r) but it seems they are generally allowed to be given in evidence where they have been publicly kept as such.(s)

## [ \*538 ]

## \*CHAPTER V.

## BOOKS OF THE HERALDS' COLLEGE.

ABUNDANT sources of genealogical evidence are to be found in the records of the College of Arms.(t) The first Report of the Record Commission appointed in 1800, enumerates eight different classes of these documents.(u)

1. A series of books called Visitation Books, containing the pedigrees and arms of the nobility and gentry.

2. Books containing miscellaneous pedigrees and arms of nobility and gentry, being entries made in the office, as well during the time when visitations were in use, as since that period.

3. Books of pedigrees and arms of the peers, pursuant to the standing orders of the House of Lords of the 11th May, 1767.

4. Books of pedigrees and arms of baronets, under a royal warrant of 3rd December, 1783, "For correcting and preventing abuses in the order of Baronets." These pedigrees and arms had heretofore been entered in the course of duty and rule of office in the books before alluded to, and not peculiarly appropriated to the order of baronets.

[ \*539 ] \*5. Books of entries of funeral certificates of the nobility and gentry, being attested accounts of the time of death, place of burial, and of the marriages and issue of the several persons whose funerals were attended by officers of arms or their deputies. These books refer to the same period of time as the Visitations. There are also some certificates which have been entered within a few years.

6. Books containing accounts of royal marriages, coronations, and funerals.

(p) Berkeley Earldom, Min. Ev. 793.

(q) How. St. Tr. 17. 810. 854.

(r) 1 H. Black. 93, note (c).

(s) 1 Strange, 93. 210.

(t) The College of Arms, or as it is frequently called, the Herald's College, was incorporated by letters-patent as early as the first year of the reign of Richard III., 1483, by the designation of the King's Heralds and Pursuivants of Arms, with power to use a common seal when required in the exercise of their faculty; and by a second charter in the second year of the reign of King Philip and Queen Mary, was again incorporated, when for the better custody of the records and inrolments of their faculty, a building afterwards destroyed in the great fire of London, upon the site of the present one, was granted to them. Grim. Orig. Gen. 251.

(u) First Report of Record Committee, App. C. 8.

7. Books called Earl Marshals' Books, from the time of Queen Elizabeth.

8. Books of arms of the nobility, and Knights of the Garter and Bath, and docquets or copies of all grants of arms to the present time.

In addition to the above, the Report of the Record Commissioners, appointed in 1830, mentions four other classes of records of a similar nature.

9. A list of knights from early periods, and the only authentic record of the names, &c., of individuals upon whom the honour of knighthood has been conferred from the commencement of the reign of King James I., to the date of the report, (1834).

10. A register containing the pedigrees and arms of the Knights of the Bath, and their respective Esquires, recorded in pursuance of the king's command, declared by a statute of the Order of the Bath, bearing date the 8th May, 1804.

11. Registers containing arms and pedigrees relating to Scotch and Irish families, being the record of certificates and grants of armorial ensigns, and copies of pedigrees transmitted from the respective offices of the Lord Lyon King of Arms of Scotland, and Ulster King of Arms of Ireland.

12. A series of books termed Partition Books, commencing in the reign of Henry VIII., containing an account of fees received on the creation of peers, baronets, and knights, [ \*540 ] and upon the consecration and translation of bishops; as also for the attendance of the officers of arms at royal coronations, funerals, and other public ceremonials.

The report then goes on to state, "The foregoing may be considered as coming under the description of official records, as they contain entries made by the proper officers in the regular exercise of their duty; but the library of the College of Arms, contains also nearly 1200 other MS. volumes, consisting of copies of visitations, collections of pedigrees and arms, transcripts, and abstracts of charters, deeds, inquisitions, and other records applicable to genealogical and antiquarian researches; comprehending the accumulated labours of Glover, Camden, Vincent, Phillpot, Walker, Dugdale, Le Neve, Dale, Brooke, and Townsend, and those of some other distinguished and able members of the college." (v)

If by the expression, "official records," above quoted, is meant to be implied that the various classes of heraldic documents enumerated, possess the character and qualities of official records, so as to entitle them of themselves to be admitted in evidence, it is conceived that such a proposition is not supported by legal authority. Some of them undoubtedly possess that character; but others, though useful for purposes of information, if admissible as evidence are, at the best, but of a secondary nature.

In the earlier cases, we find that heralds' books have been often rejected. One obvious ground of objection to the admissibility of such entries, was the circumstance of their being *ex parte* statements.

(v) In the Catalogus, lib. MS. Angliæ et Hiberniæ, Oxon. 1697, vol. ii. p. 175, there is a catalogue of the manuscripts in the College of Arms; it is probably imperfect.

Thus, a case is cited in *Vin. Abr.*,<sup>(w)</sup> where it was held that an entry in the *Heralds' Office* shall not be allowed good evidence to [ \*541 ] prove a pedigree for an heir, because they are not matters of \*record, but allowed only as circumstantial evidence. And in another case in ejectment before Fortescue, at the Sarum Assizes, 1719, heralds' books were not allowed as evidence to prove a pedigree, for he said it was made up by the party who signed it, and returned it into the office, and not the duty of any public officer.<sup>(x)</sup> In evidence to a jury to prove J. S. to be heir to J. S., the court would not accept of a pedigree drawn by a herald at arms as evidence, nor would they suffer the jury to have it with them.<sup>(y)</sup>

It does not appear what was the exact nature or description of the heralds' books which were rejected, but it seems probable that they were such as some of those included in class 2, of the above cited report. In a case from Plowden, cited by Viner,<sup>(z)</sup> it appears that heralds' books were admitted to prove cosinage.<sup>(a)</sup>

Some of them, however, are of undoubted authority, amongst which the visitation books claim the first place, in respect both to their official character, and to the copious supplies of minute genealogical information which they will be found to afford.

These visitation books contain the pedigrees and coats of arms of the nobility and principal gentry in England, made out by the heads of the respective families, or some persons on their behalf, and delivered to the heralds, who by virtue of commissions from the crown, were authorized to require them to be made out, proved and delivered.

By the terms of the royal commissions the heralds were authorized to make circuits through the different counties within their respective provinces, and "to peruse and take knowledge, survey and view of all manner of arms, cognizances, crests and other like devices, with [ \*542 ] the notes of the descents, pedigrees, and marriages of \*all the nobility and gentry therein; and also to reprove, control, and make infamous, by proclamation, all such as unlawfully and without just authority, usurped or took any name or title of honour or dignity."

The first commission proceeding from royal authority,<sup>(b)</sup> was issued to Thomas Benolte, Clarenceux king of arms, in the 20th of Henry 8th, 1528-9, by warrant under the privy seal, empowering him to visit the counties of Gloucester, Worcester, Oxford, Wilts, Berks and Stafford.

(w) 12 *Vin. Ab.* 119.

(x) *Ibid.*

(y) *Plumpton v. Robinson*, 1 *Roll. Ab.* 686, pl. 2.

(z) *Vin. Ab.* 12, 119; *S. C. Dyer*, 319 b.

(a) The case of Dethick, Garter King-at-Arms, temp. Eliz. anno 1575, for making a false pedigree for George Rotheram, Esquire, against the Earl of Kent, doth manifestly show that a pedigree is not always to be relied on, because it has been compiled by a herald, and bears the high-sounding attestation of even a king-at-arms.—See *Collins on Bar.* p. 141, 143.

(b) Visitations have been stated to commence as early as the reign of Hen. 4, from the asserted existence of a MS. in the Harleian Collection, entitled "*Visitacio facta, per Marischallum de Norroy ult. ann. Henrici 4ti 1412*," a period of seventy years before the incorporation of the *Heralds' College*. It is clear, however, on referring to the MS. in the Harleian Collection, (from which these words are selected) that an examination would have shewn the incorrectness of calling it a visitation in 1412. The MS. is a folio, consisting of loose pedigrees and miscellaneous heraldical scraps, some written as late as 1620 and 1637, pasted on the leaves of a printed book, the contents whereof are very fully detailed in the *Catalogue*, (1808,) vol. i. p. 592, no. 1196. *Grim. Orig. Gen.* 252.

Similar commissions were usually granted to the succeeding provincial kings of arms soon after their admission to the office, from that period until the 2nd year of James 2, (1686,) when the last was issued to Sir Henry St. George, then Clarenceux: the returns under which commission do not appear to have been perfected till 1703-4, as entries of that date appear in the visitation of London.

The commissions for these surveys granted to the kings of arms, gave them power to appoint deputies, and in very many instances the visitations were made by the heralds they delegated in their names. The nobility and gentry were summoned in each county, (under warrants,<sup>(c)</sup> addressed to the bailiffs of the hundred,) to give an account of their family, and produce their title to the arms and crests they used.

The subject of visitations attracted the attention of the commissioners for executing the office of Earl Marshal in 1668. [ \*543 ] Amongst their orders is one respecting "the orderly and regular course" to be observed at visitations, which contains a provision that "in all entries of descents in visitations, the said provincial kings of arms and their deputies, shall not enter or register more descents or collateral branches with their hatches (unless the same be made out by deed, evidences, or other authentic proof,) then that the parties appearing shall either probably affirm of his owne knowledge to be true or manifest that he hath received from his parents or neer relations, or which shall be attested by one or more persons of good quality of the neighbourhood, or some other credible testimony. And that in all such entries the times of the deceases of the defunct, together with the several ages of the other persons then living, and therein named, (if it may be,) as also extracts of the proofs produced for making out the same descent shall be inserted."<sup>(d)</sup>

It is obvious that where the instructions contained in these commissions and orders were fully acted up to, a very copious, and accurate genealogical history of the principal families in the kingdom would be compiled; and the visitations being from time to time renewed, we may expect to find these pedigrees forming complete chains of descent for many generations.

The authority with which the heralds were intrusted to call for evidences of the pedigrees produced to them for enrolment,<sup>(e)</sup> would, if duly exercised, enable them to ascertain the accuracy of such documents. And the visitation books accordingly bear internal evidence of general correctness.

Errors have, however, occasionally intruded into the Visitation Books. And in one case, Holt, C. J., speaking of Heralds' books, said, they did not deserve much credit, because they were so negligently kept.<sup>(f)</sup>

\*In the Lansdowne MS. 255, fol. 43, there are entered [ \*544 ] the proceedings upon a reference by the deputy of the Earl Marshal to the College of arms, of complaints of the gentry of

(c) Copies are printed in Noble and Dallaway.

(d) Roos Barony, Min. Ev. 333.

(e) In the Appendix will be found copies of the summonses issued by the heralds to persons to attend with their pedigrees, evidences, &c. which will shew the nature of the proofs upon the authority of which the pedigrees were enrolled.

(f) *Steyner v. Burgesses of Droitwich*, Skin. 623.

Shropshire touching a false pedigree of Daniel Wycharley, entered in the visitation of that county.(g)

In the earlier visitations little more is recorded than notices of the arms and accounts of the lineal descending line of the family; but they afterwards become more full, and often contain particular statements of the collateral, as well as the lineal descendants, supported by extracts from family evidences. The visitations are commonly headed by an emblazonment of the armorial bearings of the family, and occasionally further illustrated by drawings of seals; they are also in most cases verified by the signature of the heads of the families, and not unfrequently by that of persons signing on their behalf, and sometimes also by the additional signatures of other members.

It seems to have been customary at visitations to take what were called church notes: that is, copies of monuments, escutcheons, arms upon the windows, &c.(h) It may be a question whether if the originals be defaced or destroyed, these copies taken by the heralds in the execution of their office would not now be evidence.

Most of the original visitation books are in the College of Arms. Transcripts and copies of many of them, and some originals, are however in existence in other depositories.(i).

[ \*545 ] \*The return made by J. Planta, Esq., the principal librarian to the British Museum, to the select committee on public records, states that many of the pedigrees contained in the visitation books in that library, are the originals signed by the heads of the families.(j) Although these books, not being in proper custody, might not be admissible as direct evidence, yet upon giving proof of the signatures they might be used as evidence of reputation.(k)

It appears from the evidence of Mr. Townsend, Windsor herald,(l) that so late as the time of Sir W. Dugdale, it was the common practice only to deliver fair copies of the visitations to the College, the herald himself retaining the originals. Upon a representation by that body of the evils which might ensue from such a practice, Sir W. Dugdale delivered to the College all his original visitations.(m)

(g) See also the Camoys Barony, Min. Ev. 56. 338.

(h) In the Cole MSS. Brit. Mus. vol. ii. p. 753, is a copy of church notes taken upon a visitation of Cambridgeshire in 1684.

(i) In Gough's *Collectanea Curiosa*, p. 270, there is a complete list by Anstis, Garter-King-of-Arms, of all the Visitation Books of the several counties of England and Wales, with references to their places in the Heralds' College, the Harleian Library, and other depositories; and a notice of numerous private collections, and collectors of pedigrees, arms and church notes, in different counties. A tracer of pedigree will find this tract a useful index to the above interesting sources of information. Catalogues of the visitations will also be found in Dallaway's *Heraldry*, Moules's *Bibliotheca Heraldica*, and Nicolas's *Catalogue of Heralds' Visitations*, 1824. This last contains the most accurate information. The Durham visitations for 1575 and 1614, and the Middlesex visitation for 1623 have been printed.

(j) See First Report of Select Committee on Public Records, p. 390. The original visitations of 1620, and Wiltshire, Somersetshire, and Dorsetshire, 1623, are in the British Museum, and transcripts exist in the College of Arms. Grim. Orig. Gen. 255. Besides these, there are visitations preserved in the Ashmolean Collection, and the library of Queen's College, Oxford, and Caius College, Cambridge.

(k) See per Pratt, C. J., *Pitton v. Walter*, 1 Stra. 162.

(l) Zouche Barony, Min. Ev. 147.

(m) In the life of Sir Wm. Dugdale, it is mentioned that he was remarkable for the care with which he made his visitations, "taking exact notice of all collaterals;" and also for his zeal in defacing fictitious and irregular tablets and monuments.

It has been stated that the visitation books are of authority as evidence in the nature of official records. It does not appear that their admissibility has ever been judicially questioned.

In the case of the Earl of Thanet v. Foster, copies having been refused, the books themselves were afterwards produced and allowed in evidence, *being ancient*, to prove the pedigree of the plaintiff.(n)

In another case it is stated the visitation book of the county of Worcester was allowed in evidence, being an original.(o)

And at the Surrey assizes, in 1719, to prove a pedigree, Pratt, C. J. admitted a *visitation* in 1623, made by the heralds, entered \*in their books, and kept in their office to be read in [ \*546 ] evidence. He also admitted the minute book of a former visitation, signed by the heads of several families, which was found in the library of my Lord Oxford.(p)

Again, at the Norwich assizes, in ejectment, a book out of the Heralds' Office was produced to prove a pedigree. Objections were made to this evidence. The Chief Justice at first doubted, but as it appeared that this pedigree was taken upon an inquest made on a visitation, he allowed it to be good evidence, and it was accordingly read.(q)

The grounds upon which these books are admitted as good evidence may be collected from observations addressed to the counsel in the De Lisle Peerage case.(r)

The counsel were informed that the House had made a distinction in receiving as evidence books from the Heralds' College; that when those books contained the substance of the information obtained in consequence of inquiries which were made under judicial authority, when the heralds were in the habit of travelling round the country, and examining the witnesses, they were held to be evidence, and had been produced in committees of privilege; but that when that ceased, and the books were mere entries of that which parties had chosen to have entered in those registers, without any due authority being shown for the entry, they had not been received in evidence.

Conformably with this principle, it has been the practice of the House of Lords to require the production of the original commission under which the visitation was made, before admitting the visitation book itself to be put in evidence. This rule, however, is sometimes relaxed. Thus, on the claim of George Leigh to the barony of Leigh, the visitation book of Warwick, 1683, was put in evidence, it being proved by Garter that he could not find the commission.(s) But it would seem that the rule has not always been in \*force [ \*547 ] in the House. In the year 1812, on the claim of Viscount Kilmorey to vote at the election of Irish Peers, the commission under the great seal to take a visitation was put in, being proved to have been examined with the enrolment of the record in the Rolls' chapel. Francis Townsend, Windsor herald, said that he had not been in the habit of producing authorities of that kind at that bar, because the

(n) 2 Jones, 224.

(p) Pitton v. Walter, 1 Stra. 162.

(r) Min. Ev. p. 12.

(o) Matthews v. Port, Comberbach, 63.

(q) Norris v. Le Neve, 2 Barnardiston, 26.

(s) Leigh Barony, 1839, part 2, 138.

fact of the heralds' making visitations is too well-known in that house to need that. He had produced them in Courts of Law.(t)

Where the commission has been proved, the connexion between that, and the visitation book relied on, must be shown. This is usually done by the title of the book and the signature of the officer of arms, who made it. In one case, after proving a commission from Jac. I., to Clarencieux, to visit, a book marked C. 16, was produced from the Heralds' College, which was stated to be the original visitation of Gloucestershire for 1623, taken under that commission by Mr. Camden, who was Clarencieux at that time. The pedigree, in support of which it was tendered, was signed by two persons bearing the family name, but not proved to be members of it. The book was one of a set, but had no title, and no official signature; and the only evidence that it was compiled under the authority of the royal commissioner was the fact of its having the same appearance, and having consecutive numbers with other books, which were undoubtedly authentic. There was in the book a reference to the visitation under the head of Tewkesbury. The Attorney-general at first objected to this book being put in, but afterwards he stated that having ascertained that the facts contained in the pedigree entered in it, were perfectly consistent with the facts appearing in other evidence, he had no objection to the same being put in, if it appeared to their lordships that the book was sufficiently identified as one of a series of returns to visitations. The pedigree was allowed to be put in.(u)

[ \*548 ] It is not necessary to the admissibility of these books that the \*statement of pedigree relied on should be signed by a member of the family. In the Roos claim of peerage in 1804, the original visitation of Lincolnshire was put in evidence, in which the pedigree of the Earl of Exeter was signed by "Robert Gibbons, for my master David Cecill."(v) Many other instances of a similar nature are to be met with in the minutes of evidence in various claims of peerage.(w)

Neither is it required that the handwriting of the party who signed the visitation should be proved. In the Leigh Peerage case, upon offering to produce evidence of handwriting to prove the signature of Thomas Lord Leigh, counsel were informed that this was unnecessary, as it was the duty of the heralds to see the person subscribe his name.(x)

The official nature of these records is the ground upon which their authority rests; copies of them therefore, although made by heralds, do not stand on the same footing as to admissibility.

It has been before observed, that many such copies are in existence in the Heralds' Office and elsewhere, which have been often unsuccessfully tendered in evidence.

In one case already cited, the copy chart of a pedigree extracted from the heralds' books and sworn to by Sir Wm. Dugdale, and "*les autres heraults*" was refused in evidence, the Court holding that the books themselves should be produced.(y)

(t) Kilmorey Viscounty, Min. Ev. p. 7.

(u) Tracy Barony, Min. Ev. 18.

(v) Roos Barony, Min. Ev. p. 138.

(w) See Camoys Barony, Min. Ev. 152, 174. Leigh Barony, Min. Ev. 128.

(x) Min. Ev. pt. 2, 140.

(y) Earl of Thanet v. Foster, 2 Jones, 224.

So in the case of *Matthews v. Port*, it is said that copies had often been refused.(z)

And the rule of the House of Lords is the same.

In the *Chandos Peerage* case, a copy of the visitation of Gloucestershire made by Vincent, who was a herald, and bequeathed to the office by Ralph Hulton, in the year 1684, was tendered [ \*549 ] in \*evidence for the claimant. Mr. Townsend, Windsor herald, was asked whether such a book as this had ever been given in evidence either in that House or on a trial at law; and although he said he remembered attending at Stafford in 1786 or 1787, with one of Vincent's copies of a visitation of Staffordshire, the original of which was made in 1589, in order to establish the pedigree of a family of the name of Macclesfield, in a contest for the Manor of Moore, the book was rejected.(a)

So in the *Kilmorey* case, a book in the handwriting of Augustus Vincent, purporting to be a visitation of Salop in 1623, was tendered, but it being proved that this was only a copy of the visitation which Vincent enlarged, by putting into it what he found in other visitation books and papers, it was rejected.(b)

It does not appear that there is any distinction as to the nature of the matters of pedigree of which the visitation books may be given in evidence. Not only the simple facts of births, marriages and deaths, but the more complex ones of heirship, number of children, or failure of issue,(c) are within their scope.

In the *Huntingdon Peerage* case, to prove that William Hastings married and had issue, the pedigree was produced, signed by Theophilus, seventh Earl, in which he is entered "*Willielmus Hastings Clericus*," with the mark of an arrow, which Mr. Townsend stated, denotes that he had issue.(d)

But in the same case, after the claim of the petitioner had been made out, and he had taken his seat, further evidence was adduced, in consequence of some doubt of the Attorney-general, whether an ancestor of the claimant had not died without issue male, the fact of his having such issue male having been proved principally by the evidence only of two visitations.(e)

So also in another recent case it seems to have been expected \*that the fact of heirship should be substantiated [ \*550 ] by further evidence than the statement of a visitation alone.(f)

Visitation books have been even used to disprove an alleged marriage by the negative evidence of its non mention. Thus in the *Leigh* case, the visitation of Cheshire, for 1668, was produced for the purpose of disproving an alleged marriage of Christopher Leigh with one of the daughters of Sir Robert Cotton, by showing that the visitation mentioned ten daughters of Sir Robert Cotton, six of whom married persons of other names than Leigh, and the other four died young.(g)

(z) Comb. 63, cited sup. p. 545.

(a) Min. Ev. p. 122.

(b) Min. Ev. p. 8.

(c) Claim of A. L. Lloyd to the Barony of Lumley, *Lords' Journ.* vol. 22, 299.

(d) Bell's *Hunt. Peerage*, 343.

(e) Ibid. 375.

(f) *Hastings Barony*, Min. Ev. 307.

(g) *Leigh Barony*, pt. 2, 138.



But this sort of evidence is obviously less to be depended on than the statement of positive facts.

Thus, the enumeration of a certain number of children only, is not conclusive of the fact, that there were no others: since many cases have occurred in which such defective returns have been made.

Amongst the records in the College of Arms, forming the second class, mentioned in the Report of the Record Commission, are various miscellaneous volumes, entitled modern pedigrees, which contain the air record of pedigrees of families, proved in continuation of former entries in the visitations, and of such others, though not before entered, as produce proof in support of their descents. These records commenced about 1689, 1 Wm. & Mary. Some few pedigrees are entered during the periods in which the visitations were in operation under the Earl Marshal's orders, or those of the chapter; sometimes in cases where the parties had been absent from their counties, when the heralds were making their surveys.<sup>(h)</sup> They come down to 1826; others are copies of large pedigrees in which all the branches of an extensive family are brought together, compiled by divers officers of arms, and authenticated under the common seal of the corporation.

[ \*551 ] It does not appear what proofs were required or exhibited in \*support of the pedigrees thus registered in the college: the modern practice has not been very strict in that respect.

It is stated to be customary at the Herald's College, on registering pedigrees, to obtain the signatures of individuals to verify them. They admit as sufficient evidence for this purpose, the statement of a living individual respecting the marriage and deaths of his grandfather and grandmother and their births, as well as the marriages and deaths of all the generations descended from them.<sup>(i)</sup> Perhaps the signature of the head, or other members of the family may have been always considered sufficient to establish the correctness of the pedigree so attested.

It was suggested in a former page<sup>(j)</sup> that documents of this description cannot be considered as evidence of a primary character. The House of Lords have not always rejected them: but the modern decisions have been unfavourable to them.

In the case of the barony of Willoughby of Parham, a manuscript book from the Heralds' Office, called "Arms and Descents of Nobility" marked E. 16, was received as evidence of pedigree.<sup>(k)</sup> This book was offered in evidence in the case of the barony of Zouch of Haryngworth,<sup>(l)</sup> but the counsel not being able to shew under what authority the collections entered therein were made, and resting only upon the circumstance of its having been before received, the Committee of Privileges held it inadmissible.<sup>(m)</sup> And other books from the Heralds' Office possessing no higher authority were also rejected.

In the Berkeley Peerage case,<sup>(n)</sup> it was proposed to read an entry in the original registry of the College of Arms of the marriage of the Margrave and Margravine of Anspach, at Lisbon, in the kingdom of Portugal. It was stated that they both came voluntarily to the office, and desired this certificate of their marriage with the pedigree of the

(h) Grim. Orig. Gen. 258.

(i) Sup. p. 540.

(j) Min. Ev. 205.

(k) Greenley on Evidence, 227, n.

(l) Cruise on Dig. 271.

(m) Ibid. 206.

(n) Min. Ev. 40.

Margrave to be entered, in order to make it as authentic as they could. They both signed it, and produced the original certificate. The house refused to receive this evidence.

\*Where these pedigrees have been signed by members of the family, upon proving such signature, they may be [ \*552 ] used as secondary evidence in the nature of declarations and reputation.

In the Kilmorey case there was produced to the House a book of entries of pedigrees from the Heralds' College extending from 1697-8 to 1753, containing pedigrees of persons who having found that their ancestors had formerly recorded their pedigrees, had been desirous of continuing the same up to their own time. It was in the handwriting of a herald, but was signed by several members of the family. A witness was examined to prove some of those signatures; and upon that evidence the pedigree was admitted.(o)

In the same case a pedigree found among the muniments of the family and appearing to have been compiled by heralds, but not signed by any member of the family, seems to have been considered inadmissible.(p)

The book used in the Kilmorey case was afterwards produced in the Huntingdon case, to prove a pedigree which was signed by Selina, widow of Theophilus, ninth Earl of Huntingdon.(q) And similar pedigrees were admitted in the case of the Hastings Barony,(r) and in the claim of Lord Rokeby to vote at the election of Peers in Ireland, in 1830.(s)

In all these cases, the question of admitting or rejecting the document turned upon the same point, namely the proved signature of some member of the family; thus establishing a clear distinction between records of this nature and the visitation books, which as we have seen, are admissible without such proof.

In the claim of Thomas Twisleton to the Barony of Say and Sele in 1781, it was stated that the pedigree of Fenys, as stated in the petition and case, would be proved by various ancient books in the College of Arms; viz. Baronage, marked Black Book, Baronage, No. 20; Vincent, No. 2; Visitation of Oxfordshire in \*1566, [ \*553 ] and Visitation of Oxfordshire in 1684. It was further stated, that the marriage of John Twisleton with Elizabeth, daughter and co-heir of James Fiennes,(t) might be proved by the said Baronage, called Black Book; by Vincent's Baronage, No. 20; and Baronage marked Arbor Honoris; all in the library of the said College. The claim was allowed, but it does not appear whether the Baronages mentioned were admitted, nor what was the character of those books. Three years afterwards a Black Book of Baronies, probably one of the same books, was produced in the Howard de Walden case, and an extract read from it.(u)

The third class of Heraldic Records mentioned in the Report of the Commissioners, consists of Peers' pedigrees taken under the standing order of the House of Lords, made in 1767. For the history and par-

(o) Kilmorey Viscounty, Min. Ev. p. 12.

(q) Bell's Hunt. Peerage, 328.

(r) Rokeby Barony, Min. Ev. 18.

(u) Howard de Walden Barony, Min. Ev. p. 16.

(p) Ibid. p. 14.

(r) Min. Ev. 246.

(t) Say and Sele Barony, Min. Ev. 173.

ticulars of that order, the reader is referred to a former part of this treatise.(v)

These pedigrees were duly taken, and after having been proved at the bar of the House of Lords were registered, until the rescinding of this useful order in the year 1802. The last entry which appears in these registers, is a blazon of the arms of Lord Redesdale, who was created a peer in that year. In the pages intended for the genealogies of Lord Thurlow and some few other noblemen, no entries but that of their respective coats of arms have been made.(w)

The pedigree of James, Duke of Chandos, deceased, proved before the Committee of Privileges, on the 28th day of February, 1774, and duly certified by his Grace on the same day, pursuant to the above standing order of the House, was read for the claimant in the Chandos case.(x)

With reference to the Patents of Baronets it may be observed, that previous to the date of the Royal warrant of the 3rd of December, 1783, there was no separate register in the College of Arms peculiarly [ \*554 ] appropriated to the order of Baronets; neither were the patents of Baronets registered at the college before that time: the first registration took place under the authority of that order, and the practice of recording every patent at length continues to the present day.(y)

Since 1783 all the patents of Baronets have under the direction of a royal warrant been transmitted from the Crown Office to the register of the College of Arms, to be recorded in books kept for that purpose, before delivery to the grantors; and the pedigrees of the Baronets are by the same warrant ordered to be recorded before the passing of the patent.

The title of the documents described as Funeral Certificates denotes the occasion of their production and the information they contain. The conclusion of a life seems to suggest some inquiry into its history, and the descent of a man, the alliances he has formed, and the posterity he leaves, have generally engaged attention at the period of decease.

These funeral certificates contain attested accounts of the time of death, place of burial, and of the marriages, issue, and frequently the collateral branches of the several persons whose funerals were attended by the officers at arms, or their deputies, illustrated with the armorial bearings of the deceased. The entries in the funeral certificates are so full and authentic, that they are of great value to those families whose ancestors are recorded in them.(z)

The nature and authority of these records were thoroughly investigated in the Fitzgerald claim to the barony of Roos, from the evidence in which case the following statement is chiefly taken.(a) In 1568, the Earl Marshal issued certain orders to the officers of arms, amongst which was the following regulation with respect to funeral certificates:—"Item. It is also ordered and decreed, by the said Earle Marshall, that every King of Armes, Herald or Pursuivant, that shall serve

(v) Sup. p. 98.

(w) Grim. Orig. Gen. 259.

(x) Min. Ev. p. 26.

(y) Public Record Committee Report, 1837, App. 107.

(z) Grim. Orig. Gen. 255.

(a) Roos Barony, Min. Ev. 183.

at any Funerall as is aforesaid, shall bring into the Library or Office of Armes a true and certaine "Certificate, under the hands [ \*555 ] of the Executors and Mourners that shall be present at the said Funerall, conteyning the day of the Death, and the place of the Buriall of the person so deceased. And also to whom hee or shee marryed, what issue they had, what yeares they were of at the time of the said Buriall, and to whom they were marryed, to the intent that the said Certificate may be registered, and soe remain as a perpetuall record in the said Office for ever." Among certain orders of the Lords Commissioners for executing the Office of Earl Marshal, in 1668, there was one to the same effect.(b)

In pursuance of this order, the certificates were registered in books. It sometimes happened that the representatives, or others of the family of the deceased have come to the office after the registration has been made, and have put their names to the registration. Previously to the year 1674, the original certificates were not preserved, but since that year, the originals of the nobility are for the most part remaining in college.(c)

When heraldic influence began to decline, these funeral entries were also neglected, though, the certificates of some are recorded as late 1710, 1713, 1717. There is one for G. M. Leake, Esq., Garter-King-at-Arms, in 1735, and another for Evelyn Duke of Kingston in 1773. Those of Nelson and Pitt have not yet been entered.(d)

Attempts were made at different times to procure Acts of Parliament for recording the descents of the nobility and gentry, but without success. In the 6 & 7 Wm. & M. however, a bill of that description, in the shape of a money bill, was passed.

By section 50, (e) for the better preserving the genealogies, descent, and alliances of the nobility and gentry, it was enacted, that upon the burial of every person charged with the duty of 20s. by that act, (except such as were charged only in respect of their having 50*l.* per annum in real estate, or 600*l.* personal \*estate,) the party [ \*556 ] liable to pay the said duty should deliver to the collector appointed by that Act, a certificate in writing under his or her hand and seal, engrossed in parchment or otherwise, expressing the name, surname, title, quality, office and employment (if any) of such deceased person, with the age, time of death, place of burial, marriages and issue, and the ages of such issue, together with the names, surnames, titles and qualities of the parents of such deceased persons, which certificates shall be transmitted to the receiver-general, his deputy or deputies, who shall deliver them to the King's heralds and pursuivants of arms. And the said officers of arms shall thereupon forthwith number, schedule, and digest the same in alphabetical order in books to be provided for that purpose, and shall fill up the originals in the College of Arms for public use, and shall be answerable for the keeping thereof without any fee or reward for so doing.(f)

As might have been expected, the last provision of this clause was

(b) Ross Barony, 330, 331.

(c) Ibid. 184, 185.

(d) Grim. Orig. Gen. 255.

(e) 6 & 7 W. & M. c. 6, s. 50.

(f) This section does not appear in the statutes at large.

fatal to its efficiency. It was, in fact, never carried into effect, (g) and the act itself expired on the 1st of August, 1706.

The modern practice of the House of Lords regulating the admission of these certificates, seems to be analogous to that which prevails with respect to visitations. The Earl Marshal's order, being the authority under which they were made, is first proved, and then the certificate is allowed to be put in. This was the course followed in the Roos case, and on subsequent occasions. (h)

It has been stated that all the certificates now in the Heralds' College are not originals, and it seems to have been doubted whether such as are not original can be received in evidence; absolute proof of their originality was apparently not required in the earlier cases.

In the Howard de Walden Peerage case in 1784, an ancient book of funeral certificates, *believed* to be an original, as in one of the pages [ \*557 ] it was signed by the Earl of Suffolk, was produced and \*received in evidence, to prove the death of the first Earl of Suffolk in 1627. (i)

The certificate in this case may have been the original return; but the same book was afterwards tendered in evidence in the Roos case, (j) from the proceedings in which it is apparent that some of the certificates registered in that volume were not originals.

In the last mentioned case, counsel stated they would prove a further part of the pedigree by the heralds' funeral certificate of Philip Earl of Pembroke, taken in the year 1649, and having first produced the original deed under the hand and seal of the Duke of Norfolk, Earl Marshal in 1568, establishing certain orders for the regulation of the officer of arms, under which such certificates were taken, a book intituled, "Funeral Certificates of the Nobility" was produced. It was objected to by counsel, as not being the original certificates, and although it was stated to have been produced before the House in several previous cases, (k) the receiving of it as evidence was postponed, until a volume of funeral certificates, and such original certificates as remained in the heralds' office were produced. (l) On a subsequent day, counsel having produced a partition book of the heralds containing an account of the partition of all the fees divided between the heralds on occasion (*inter alia*) of funerals, wherein was entered the partition of fees on the funeral certificates proposed to be read, and having produced such originals of funeral certificates as remained in the Heralds' Office, and shewn that they were correctly registered in the book offered in evidence, the counsel was informed that upon the facts proved, the book intituled "Funeral Certificates of the Nobility" might be read, for the purpose for which it was offered in evidence, the Attorney-general not objecting thereto. (m)

On another occasion also a book of funeral certificates was proved. It was stated by the counsel that the originals were signed by the

(g) See Narrative of Heralds by Garter, delivered to the House of Lords. Harg. MSS. 494.

(h) Roos Barony, Min. Ev. 183. Vaux Barony, Min. Ev. 132. Camoys Barony, Min. Ev. 67.

(i) Min. Ev. p. 16.

(j) Min. Ev. p. 204.

(k) The Banbury, Clinton, Beaumont and Howard de Walden cases were quoted.

(l) Min. Ev. 186.

(m) Ibid. 220

relations of the deceased, and they were then copied \*into [ \*558 ] the book then tendered: that the book itself was not signed, and that the originals remained in the College of Arms. The book was admitted.(n) And if it is proved that search has been made for the originals without success, the copies may be put in evidence.(o)

From what took place in the Braye Peerage case, it seems to have been sometimes considered that the admissibility of funeral certificates depends on their bearing the signature of relations of the deceased.(p) In the Vaux case, however, the objection was made that the signature of executors or relations was wanting, but afterwards the certificate was received as an official document taken by those whose duty it was to make it up.(q)

These certificates may be given in evidence to prove, not only the deaths of the persons on whose funerals they were made, but also the other matters of pedigree stated in them.(r) Perhaps the true distinction to be taken in requiring proof of the signature is, that where the death of the individual is the subject of proof, the certificate is of itself good evidence, as an official statement of a fact within the immediate cognizance of the officer who returns it; but where, as in the Clinton case, the certificate is put in to shew matters of pedigree, as marriage, or issue, which could not be supposed to be within the personal knowledge of the officer, the signature of some person connected with the family is necessary to attest its truth.

The books called the Earl Marshals' Books, commence in the time of Queen Elizabeth, and continue to the present day: they contain entries of such instruments and warrants passed under the royal sign manual as relate to the arms of the blood royal, licenses from the crown for the change of surnames and arms, or for acceptance of foreign honours: warrants for the grants of precedence, and augmentation to arms for public services, &c., and generally whatever relates to that part of the office of Earl \*Marshal which concerns [ \*559 ] the superintendence of the college, or relates to matters of state, concerning which the public orders are issued by the Earl Marshal, or within his department. The early volumes of these books contain entries of some proceedings in the Earl Marshal's Court, from the time of Queen Elizabeth to that of Charles II. inclusive; and such of the original documents and records as still exist, relating to suits and proceedings of the Court of Chivalry, between the years 1630 and 1707, are deposited in the library of the college.(s) The earliest entry in those books is in 1601, the 43rd of Elizabeth; previously to that period the Earl Marshal's orders were frequently entered in the chapter minutes, partition books, &c.

The Earl Marshal's books have frequently been received in evidence.

In the claim of Sir George Jerningham, Bart., to the barony of Stafford, part of the petitioner's evidence in support of his claim and pedigree, was a register from the College of Arms, containing entries

(n) Chandos Barony, Printed Ev. 124.

(o) Vaux Barony, Min. Ev. 132. 195.

(p) Braye Barony, Min. Ev. 98, where Banbury Earldom, Min. Ev. pp. 230. 241, and Ross Barony, Min. Ev. 186. 338, are cited.

(q) Min. Ev. 132. 195.

(r) Clinton Barony, Mr. Serjt. Hill's Coll. vol. 30, p. 331.

(s) Public Record Committee Report, 1837. Appen. 107.

of grants of coats of arms and supporters, containing a petitionary, dated April 1720, from William Stafford, to the Earl of Berkshire, Deputy Earl Marshal, desiring to have assigned to him such supporters as his grandfather William, the last Viscount Stafford, used; and that the arms of Woodstock and Stafford might be quartered with his paternal arms; also the register of the Deputy Earl Marshal's warrant, ordering such supporters and arms, and of the grant in consequence of such warrant.(t) The book was received without objection.

This case occurred in the year 1812. On a subsequent occasion, that of the De Lisle case, in 1826, the admissibility of these books was questioned. The Attorney-general, on behalf of the crown, proposed to put in evidence, a book called "The Earl Marshall's Book," produced from the Heralds' College, containing an entry of a patent from Charles I., creating Lady Alice Dudley, Duchess Dudley. The entry was signed by Wm. Dugdale, Norroy King-of-Arms. The book was [ \*560 ] tendered in evidence of certain \*facts of pedigree recited in the patent; it was offered as a copy of a charter for which an unsuccessful search had been made in the proper depository; and it was proposed further to authenticate the document, by proving that an act of parliament had been passed for a purpose, for which in the patent it was stated that an act should be brought in. The act was accordingly read, and the evidence was further strengthened by a monumental inscription, stating that Lady A. Dudley had been created Duchess Dudley by Charles I. It was objected that the book was not legal evidence, and the attorney-general admitted that in his opinion it was not. The house seem to have so considered it, but it does not appear whether, according to the suggestion of the attorney-general, it was treated as evidence in the case, which was a matter of favour and not of right.(u) In later cases these books have been received without objection.

Thus in the year 1830, on the claim of Matthew Baron Rokeby, to vote at the election of Peers for Ireland, in order to account for the change of the claimant's name from Robinson to Montagu, the Earl Marshal's Book was produced, containing an entry for the year 1776, of a license for the change in question.(v)

The record of the royal license for a change of name, produced by an officer from the Heralds' College, was also put in evidence in the claim to the barony of Hastings;(w) and a similar document was produced on the claim to the barony of Camoys.(x)

Armorial bearings have often been much relied upon as showing the connection of families. The nature of this species of evidence will be considered in another part of this treatise; it is sufficient here to notice it as forming one of the branches of genealogical history more peculiarly within the duty of the heralds to cultivate.

The books of armorial bearings in the College of Arms must, like other volumes, be shown to be official before they can be received in evidence.

(t) Min. Ev. 1812, p. 106.

(v) Rokeby Barony, Min. Ev. p. 14.

(s) Min. Ev. p. 101.

(u) De Lisle Barony, 1826, Min. Ev. 12. 17.

(w) Min. Ev. p. 329.

\*In the Chandos case, a MS. book, described as a [ \*561 ] Herald Painter's work-book, was offered in evidence on behalf of the crown. It had belonged to successive Garter Kings, and was then in the Heralds' College, and Sir Isaac Heard considered, from its contents, that it had been made under some instructions from the heralds of the day. The evidence was first objected to by the counsel for the claimant, but the objection was afterwards waived. The attorney-general, however, declined to accept the waiver unless sanctioned by the authority of the house; and it appearing that, although the herald painters of the period in question had been appointed by, and acted under the directions of the officers at arms, there was no proof that the entries had been made in the exercise of the duties and rules of the office, the Earl of Rosslyn thought the book could not be received.(y)

The last class of books mentioned in the Report of the Commissioners consists of what are called Partition Books. These volumes are so called from their containing entries of the division of all fees accruing to the officers of arms, upon their different public attendances at coronations and funerals; also of their fees on the creations of peers, baronets, and knights, and the consecrations of bishops. Their utility consists in affording the names of persons created, the dates of their patents, and generally the limitations of the dignities: for many years past they contain in fact docquets of the respective patents, as also entries of the elections, and translations of archbishops and bishops. The date of the earliest entry is 19 Hen. 8, 1528; they are continued to the present period.(z) They were used, as we have seen, in the Roos case.(a)

There is in the Heralds' College also another class of books, denominated Founders' Kin Pedigrees, extending from 1620 to 1826. These volumes consist of pedigrees passed under the common seal, certifying the descents of individuals from certain founders of colleges, or fellowships, in the different universities, who have by their wills, settlements, or statutes for the \*regulation of their bene- [ \*562 ] factions, directed a preference to be given to their own kindred: as in the cases of Bishop Wykeham, at New College; Sir Thomas White, at St. John's; and Archbishop Chichele, at All Souls, in the University of Oxford; and Bishop Dee, at Cambridge.(b)

These volumes also contain the descents of persons from the blood royal of England, who, by virtue of such descent, have taken or were entitled to honorary degrees at Cambridge. They do not commence before 1620, 18 James I. The practice of proving descents for the satisfaction of heads of colleges, in the early years after those foundations, was not by the evidence at present required, because the relationship was then matter of notoriety, and vouched for by living parties, and the custom of recording notices of descent commenced only with the visitations. One of these books was tendered in evidence in the Roos case, but was not received.(c)

The books entitled Benefactors' books at the College of Arms should

(y) Chandos case, by Belz, pp. 29. 53.

(z) Grim. Orig. Gen. 255.

(b) Grim. Orig. Gen. 257, 258.

(a) Min. Ev. 338.

(c) Min. Ev. 336.



be noticed here. A commission was issued under the Great Seal, 23 Car. 2, authorizing certain of the officers of arms to receive subscriptions from the nobility and gentry to defray the expense of rebuilding the College of Arms, which had been destroyed by the fire of London. The commission contained the following provision, authorizing the compilation of "Benefactors' books." "And our will and pleasure is, that our said officers of armes whoe wee hereby authorize and command in that behalf, doe from tyme to tyme in testimony of their gratitude to such of our nobility and gentry as shall be benefactors herein, take and register in the office of armes in bookes of Vellome, to be provided in that behalfe, certificates and memorials of the armes they beare, together with their discents, matches, and issue, and of their liberality, to the end the memory thereof may remaine to after-ages. And also issue out and deliver from tyme to tyme under their common seal testimonialls thereof to such of their benefactors herein whoe shall require the same."

[ \*563 ] This commission was read in evidence from the Patent Roll in the Roos peerage case, (d) in order to let in the evidence of the pedigree of the Earl of Carlisle in the Benefactors' book, which appearing to have been signed by himself in 1672, was admitted without objection.

The following statement taken from the second report on the Public Records of Ireland, 1813, (e) will shew that there are numerous genealogical records in the office of the College of Arms in Dublin, of a nature similar to those in the Heralds' College in London:—Ulster king of arms has in his possession:

1st. Four volumes of books called Visitation books, containing the pedigrees and arms of the nobility and gentry of several counties in Ireland, particularly the counties of Dublin, Meath, Louth and Wexford, from 1568 to 1620, taken by virtue of commissions directed to Nicholas Harbonne and Daniel Molyneux, Ulster kings of arms. It appears that visitations were made in other counties from the references in the various books now in the office to such as were formerly there, and which were, it is supposed, detained as private property by the heirs or executors of the former officers; but at what particular period is unknown. Many books are also said to have been carried off by the person holding the office of Athlone Pursuivant of Arms, who fled to France with King James II. He also carried off the official seal.

2. Fourteen volumes of books, containing miscellaneous pedigrees and arms of the nobility and gentry of Ireland, being entries made in the office at various periods, and authenticated under the hand and seal of Ulster.

3. Four volumes of the pedigrees and arms of the peers of Ireland, called Lords' entries, pursuant to an order of the House of Lords, dated 12th August, 1707.

[ \*564 ] 4. A book of the pedigrees and arms of the baronets of Ireland, \*under a royal warrant, dated 30th day of September, 1789, for correcting and preventing abuses in the order of baronets.

(d) *Ross Batory, Min. Ev.* 186, 187.

(e) *Appendix, p. 65.*

5. Fourteen volumes of Entries of the Funeral Certificates of Nobility and Gentry of Ireland, being attested accounts of the arms, of the time of the death, the place of the burial, and of the marriages and issue of the several persons whose funerals were attended by the officers of arms or their deputies, from the year 1595 to about the year 1698.

6. Books containing lists of the peers as they sat in parliament at various periods, and also of the creations of peers, baronets, and knights, from the time of Queen Elizabeth to the present time.

7. A book containing entries of the royal licenses for changes of name and arms, and other matters.

8. Books of registration of all grants of arms from the time of Edward VI. to the present time.

There are also some pedigrees and arms of the Peers of England; copies and abstracts of various records, and matters relative to genealogical and antiquarian research; and also some copies of the visitations of the English counties of Yorkshire, Lancashire, Cheshire, Norfolk, Suffolk, &c. There are also some vellum rolls of the pedigrees of some ancient families of Ireland.

The order of the Irish House of Lords of 1707, by virtue of which the records of the third class above enumerated were established, expresses that it will be for the service of the Peerage, that immediately after the decease of any nobleman or noblewoman, their heirs or executors should make an entry in the King of Arms' Office of the death of such lord or lady, with the matches and issues of their family. Examined copies of funeral entries in 1729 and 1750, expressed to be in pursuance of this order, were given in evidence upon the claim of James Netterville to the dignity of Viscount Netterville in 1830.(f) \*The latter document was not signed by the Lord Netterville of that period; this being pointed out, it was proved [ \*563 ] that many funeral entries about that date were not signed, and an order of the Lord Chancellor of Ireland, dated 1750, appointing a guardian to John Lord Netterville, was put in, to show that he was at that time an infant about six years old, which would well account for the absence of his signature. The entry in question seems to have been admitted.(g) It is observable that both these entries were produced to prove the marriages and issue of the subjects of them: in the latter case the evidence was corroborated by the recitals in the Lord Chancellor's order. It is remarkable that on a more recent occasion this case seems to have altogether escaped notice. In the claim to the Athenry Barony, an extract from the book of Lords' entries being tendered, the counsel were informed that the pedigrees given in under the direction above stated never had been considered as evidence, they appearing to be the parties' statement of their own case.(h)

The funeral entries described by the Record Commissioners as of the fifth class, seem to be strictly official documents, prepared by the Officers of Arms, in pursuance of their especial duty, and as such admissible on the general principle. An examined copy of an entry of this description was produced in the Netterville case, from the

(f) Min. Ev. pp. 9. 11. (g) Min. Ev. p. 11. (h) Athenry Barony, Min. Ev. p. 86.

Ulster office of Arms in Dublin. The book from which it was taken extended from the years 1633 to 1652. The entry contained a statement of the death of Lady Netterville, in 1634, and the number, names, and marriages of her children by Lord Netterville, and was expressed to be signed by him, and taken by the Athlone Officer of Arms, for the purpose of being recorded in the Ulster Office.(i)

It is observable that in this, as well as the other cases of funeral entries from Ireland, certified extracts from the books of the Heralds' Office were allowed to be given in evidence.

A book of entries, made by T. Preston, Ulster King of Arms, in [ \*566 ] the year 1634, and for a few years afterwards (probably one of \*those described in the above return as class 6,) containing his entries and lists of Peers, some of them copies from the public records now extant in the Rolls Office, and others purporting to be copied out of the Journal Book, was tendered in evidence to show that Lord Slane sat in the House of Lords in 1613. The book contained some entries as late as 1689. It was proved that the Journals of the House for that period were not in existence. The book was admitted *de bene esse*.(j)

Before quitting the subject of Heralds' Books, it may be proper to notice that about the year 1747, it was attempted to establish a general register of births, marriages, and deaths in the Heralds' College: a few entries were made at the time, but the measure failed in its effect.(k) There was in fact no authority for making such a register: and though the entries made might have been useful as information, the register itself could not have been treated as legal evidence of the truth of its contents.

[ \*567 ]

## CHAPTER VI.

## MONASTIC RECORDS.

THE practice amongst ecclesiastics of committing to writing the names of those for whom supplication was to be made, is of very high antiquity, being traceable in certain registers of the Greek church, called *diptycha*, which are mentioned in the liturgy of St. Chrysostom.(a) These *diptycha* (διπτυχα, two-leaved) were tablets of wood or ivory, on which were inscribed the names of such as either from their rank or virtues, were thought worthy to be remembered in the prayers of the church. They were of three kinds: *diptycha episcoporum*, containing the names of bishops renowned for sanctity of life; *diptycha vivorum*, which contained the names of persons living at the time; and *diptycha mortuorum*, appropriated to those who had died in the faith, having merited the prayers of posterity as martyrs, sovereign

(i) Netterville Viscounty, Min. Ev. p. 4.

(j) Slane Barony, Min. Ev. pt. 1, p. 4.

(k) Burn. on Par. Reg. 70.

(a) Diaconus in Circuitu sacram mensamthurificat, et defunctorum ac vivorum Diptycha, ut illi lubet, percurrit. Lit. St. Chrys. See Du Cange, v. *Diptycha*.

pontiffs, founders of churches and monasteries, &c.(b) The Roman Church is said to have adopted from the Greek only the two latter kind of *diptycha*; the practice of keeping which, afterwards received the sanction of the council of Merida, in Spain, A. D. 666. It was thereby appointed that in the sacrifice of the mass, their names should be recited by whom the churches were built, or who had contributed anything thereto—if they were yet living, before the altar; if defunct, with the dead in their order. Eccard, junior, treats the *diptycha mortuorum* as being the same with the register called the obituary or necrology kept in monasteries; \*and some have, with [ \*568 ] less reason, thought that the ancient *diptycha vivorum* were restored in baptismal registers.(c) Probably these memorials were not in general calculated to afford evidence of descent, any further than as they recorded the mere names of individuals; yet that some reference was had to the character of those individuals as ancestors and kinsmen, is proved by the form in which they were prayed for: *Memento etiam, Domine, patrum fratrumque nostrorum qui obierunt in verâ fide—potissimum vero qui jam nominantur, etc.*(d)

In England, monastic records have little genealogical interest until after the Conquest. It is even questionable whether the practice, afterwards generally followed, of recording in the archives of religious houses the names and pedigrees of their founders and benefactors, was known to the Anglo-Saxons. Hickee, though he states that, in order to preserve the memory of past events, charters of every kind were enrolled in the books of the monasteries, as in public registers, and enumerates many subject matters of registration, as the transactions of the county court, sales, purchases, gifts, manumissions of slaves, &c., yet makes no mention of the practice in question.(e) There are, indeed, to be found in the Monasticon, records of monasteries which carry the pedigrees of the founders to periods antecedent to the Conquest; but, upon examination, they will generally be found to bear internal evidence of having been compiled from tradition, or some pre-existing sources, and never to consist of contemporary notices. Some Saxon chartularies have been examined in quest of information on this point,(f) but none of them contain genealogical entries. In the library of Corpus Christi College, Cambridge,(g) there is a Saxon Martyrology—a description of record which, it will presently be seen, frequently comprises \*matter relative to laymen; but this manuscript, assuming that it may be [ \*569 ]

(b) Cardona, Joan. Bapt. de Diptychis, Tarracone, 1587. Histoire de l'Acad. des Incriptions, t. v. 300, t. xviii. 316.

(c) See the authorities in Du Cange, v. *Diptycha*.

(d) Cardona de Diptychis, p. 140. There is in Dibdin's Tour, vol. ii. p. 148, an account of some diptychs still extant; and a plate of a singular diptych may be seen in the Histoire de l'Acad. des Insc. t. xviii. 316.

(e) Dissert. Epist. pp. 10, 29, 70.

(f) Those of Abingdon, Evesham, and Wilton; the latter as printed by Sir R. C. Hoare. To the metrical chronicle of Wilton, published by the same gentleman, there is appended a document, entitled "*Nomina Fundatorum*," (being the names of the royal founders of the abbey,) in which are some genealogical notices, but the date of the chronicle and its appendix is as late as Henry V.

(g) Abp. Parker's MSS. Cod. Ivii. n. 5, library mark B. 4. 57. In Dunstan's Concord of Rules for the Benedictine order, directions are given for reading the martyrology at a certain period of the service. Reyner, App. p. 81, temp. Edgar, Reg

assigned to the Saxon times, contains upon this subject entries of the obits of saints and monks only.

But with the Norman rule there began a more extensive system of mutual obligation between the monks and the richer laity, under which, among the services rendered by the former in return for benefits conferred, they were accustomed to register the several particulars of the names, descents, alliances, and times of birth and death, of the families of the founders and benefactors of their monasteries. The records thus originating are to the genealogist, in the proof of ancient descent, an extensive and still available source of evidence. Whether from their national character, or that considering the manner in which they had acquired their possessions, and the some time precarious nature of their footing in the country, they saw it their interest to conciliate the clergy, the followers of William became most munificent patrons of the English monasteries. According to the superstition of the times, and the belief of the Romish church in the influence of religious offices upon the state of the soul after death, their liberality was usually manifested in the endowment of monasteries with lands to be held in frankalmoign, or by divine service, whereby the benefit of masses for their souls was secured to the donors, or to them and their heirs, as the gift might run. In order to provide for the lasting performance of these services, it was necessary to commit to writing the names of those entitled to them, lest they should be forgotten through lapse of time. Several charters have been preserved in which this latter duty is expressly enjoined or agreed to be performed. Thus about the year 1219, in a charter of Isabel, daughter of Hugh Gargat, to the canons of St. Mary and St. Edburg, in Burcester, there is a clause expressing that the said canons had admitted her and her mother to the benefit of their prayers and the suffrages of their house forever; and when they should depart this life, the canons promise that they would cause their names to be [ \*570 ] inscribed in their martyrology.<sup>(h)</sup> So in 1335, Sir John de \*Molins having been a special benefactor to the canons of St. Mary Overy, in Southwark, by an instrument in this year, they make him partaker of all their prayers, and covenant to mention him in all their masses and vigils, and as soon as notice should be given to them of his death, or the death of Egidia, his wife, to inscribe their names in their martyrology, and to make recital of them annually in their chapter, performing the like office for them as for their other benefactors.<sup>(i)</sup> Again, in a charter of the prior and convent of Hatfield, dated 1827, they grant to Roger de Wantham participation in all the services which shall be done in their house forever, and promise to inscribe his name in their capitular martyrology; and they pledge their faith that they would register these their letters-patent, as well in their martyrology, as in the greater books of their church.<sup>(j)</sup>

A charter of 1438 places the reason of the practice past a doubt. The abbot and monks of Dorchester, in consideration of twenty pounds, grant to Edmund Rede the benefit of their prayers, and then

(h) Kennett's *Paroch. Antiq.* ed. 1818, vol. 1, p. 265.

(i) *Dugd. Bar.* tom 2, p. 145. *Kean. Par. Ant.* vol. 2, p. 29.

(j) *Mon. Angl.* vol. iv. p. 434.

they say:—"Ne autem lateat hæc nostra concessio, et succedenti longo tempore per oblivionem negligatur, sed ut imprimatur cordibus nostrorum futuris temporibus successorum, volumus et ordinavimus quod cum contigerit eundem Edmundum ab hac luce migrare, nomina omnium supradictorum cum obitu eorum in nostro martilegio inserantur, et singulis annis futuris perlegantur, in die anniversariorum suorum, presenti conventu, in domo nostrâ capitulari."(k)

The records of monasteries which are the richest in genealogical matter, are, however, of a different order from the preceding; their compilation having been gratuitous, and the purpose which it was intended to serve merely temporal.

It is common to meet with elaborate histories and narrative pedigrees of founders or benefactors and their descendants, under the various titles of "*Stemma*," or "*genealogia fundatoris*"; "*Historia fundatorum*" or "*foundationis*"; "*Nomina antecessorum*" [ \*571 ] \*or "*benefactorum*"; "*Progenies fundatoris*," &c., which contain minute details respecting the descents, births, marriages, deaths, and burials of the several members of the family.(l)

No instance has been discovered where the collection of these notices is enjoined by any charter, or deed of gift, or by the statutes of the house's foundation; and the custom, in part at least, seems to have arisen from the interest which the monks themselves had to ascertain who were the heirs of their founders and benefactors, that they might render them the different services due; (of which, besides those of a religious nature, there were some feudal duties, as the aids for knight- ing the founder's male heir, and for the marriage of certain of his female descendants.)(m) Something also must be placed to the account of a desire on the part of the monks simply to gratify their feudal patrons, in whose character there were ingredients which would lead them to prize this kind of service apart from any consideration

(k) Kenn. Par. Ant. vol. 2, p. 327. See other instances, *ibid.* vol. i. pp. 434. 267. 400.

(l) Amongst the records of the Priory of Bergavenny, was one entitled "*Historia Foundationis cum fundatoris genealogia*." It contains a copious narrative pedigree, together with biographical notices of the family of ———, the founder of the Priory, from before the Conquest to the fourteenth century. Dug. Mon. Angl. vol. iv. p. 615. From the notice prefixed to this extract in the Monasticon, "*Ex vetustis membran. penes Hamond le Straunge, etc.*" it would seem that this "*Historia*" was in a separate form, and not part of a volume. In the same work is given a copious family history of the Mandevilles, Earls of Essex, founders of Walden Abbey. It is entitled "*Fundationis Historie Fundatoris etiam et benefactorum præcipuorum genealogia et res gestæ*." It is printed from a MS. formerly belonging to Walden Abbey, now in the possession of the Royal Society, and several other chapters from the same volume have been printed in the Monasticon. The headings of some of the chapters are as follows: *De Rege Stephano et comite Galfrido. De rege Henrico et comite Galfrido juniore. De obitu comitis Galfridi junioris. De comitis sepultura. De Willielmo de Mandevilla comite Essexie. De peregrinatione comitis Willielmi et de Linere Prioris. De adventu comitis ad nos. De obitu regis Henrici et filio ejus Ricardo in regem uncto. De obitu et sepultura comitis Willielmi. De Beatrice de Say et filio ejus Gaufrido.* Dug. Mon. Angl., vol. iv. p. 139.

(m) Phillips's Life of Pole, vol. i. p. 223; 2 Bl. Com. 64. This is against the authority of Lord Coke, who in commenting upon Littleton's words, that tenant in frankalmoign was acquitted of every manner of service, says, "and yet not of services only, but also of improvement of services; as if he be distressed for relief, *aide par file marier, aide par faire ses chivaliers, etc.*" Co. Lit. 100, a. Bracton, whom he cites in the margin, is an authority for the exemption from relief only. The subjection of monasteries to aids, whilst they were acquitted of all other services, may have arisen from their having been originally considered not as services, but as mere benevolences, granted by the tenant to his lord in times of difficulty and distress. 2 Bl. Com. 63.

of utility. A strong love of fame and almost proverbial regard to birth, were calculated to excite in them a wish to profit [ \*572 ] by that power to confer also an earthly immortality, with which the exclusive possession of the means of perpetuating men's origins, actions, and memories, invested the clergy. The following preamble to a narrative pedigree of the family of Robert de Haya, founder of Boxgrave Priory in Sussex, after an appropriate eulogy of the use of letters, shews that the motives of the compilers of these family histories were of this mixed character; consisting in the desire both to serve and do honour to their patrons, and to hand down useful information to their own successors: "Cum literarum beneficio rudis animus informetur, memoria reformetur, et in mentem redeat quod obscuravit oblivio, quodque vetustas temporis antiquavit; nos, per antiquorum scripturas eruditi, piæ recordationis Roberti de Haya, fundatoris nostri, et ejus heredum, nomina, per descensum generis ordinem, presenti paginâ duximus annotanda, *ob eorum amorem et honorem, et informationem nostrorum etiam successorum.* Sed imprimis appositum est, etc." (n) However, it is by no means improbable that this office of genealogists to their patrons, as it was not expressly imposed, may sometimes have been fulfilled by the monks, with a sidelong eye to the preservation of the connexion of certain families with their particular monasteries, and in anticipation of future favours. Gibbon supplies an instance where the performance of its duties was in duration co-extensive only with the patronage bestowed. Speaking of the Courtenay family, he says: "The profuse devotion of the three first generations to Ford Abbey, was followed by oppression on one side, and ingratitude on the other; and in the sixth generation the monks ceased to register the births, actions, and deaths of their patrons." (o)

The foregoing appear to be the chief objects which the monks had in view in collecting the genealogical matter with which their records [ \*573 ] abound. (p) The following is a brief enumeration of the various descriptions of documents in which such matter may occur, and it is necessary to regard the primary use, which generally gave rise to the appellation of each kind of record, rather than the actual practice of the monks in making entries. (q)

(n) From the Chartulary of the Priory in the Cottonian collection, Claud. A. vi. fol. 1, b. Mon. Angl. iv. 646. The older part of the Chartulary (in which the above extract occurs) is stated by the editor of the *Monasticon* to be written in a hand of the thirteenth century.

(o) Roman Empire, ch. 61.

(p) At the end of Tanner's *Notitia Monastica*, there is printed an alphabetical index of the founders and principal benefactors of "Abbies, Priories, Colleges, Hospitals, and Houses of Friars," with references to the Monasteries, in the *Notitia*, which they founded.

There is also an index of the persons and societies to whom the sites of the religious houses were granted, which may afford some clue to the depositories of the records.

(q) The extensive prevalence of the practice, and the comprehensive nature of the Monastic records is succinctly, but clearly expressed in the following extract from a book entitled, *Disceptatio Historica de Antiquitate Benedictinorum in Angliæ Martyrologiis*, p. 127:—Nullum fere totius Angliæ monasterium antiquum extitisse cujus non usque hodie in bibliothecis Angliæ habeantur historiæ manuscriptæ; et quidem exactissimæ. In illis consignarunt, non solum gesta eventaque precipua cujuscunque Abbatie, verum etiam res minutissimas et quaslibet domum notationes; insigniores benefactores; imo et illustres hospites, etc.: imo præterea celebriora regum procerum episcoporum gesta: adeo ut nihil fere exisset in historiis plenioribus Angliæ digestum, quod non sit ex istis abbatiarum particularibus registris depromptum. Qui ergo tam exacte reliqua omnia notarunt; rem tantamquanta est mutatio regulæ apostolorum nostrorum in Benedictinam non notassent? Om-

In most of the great monasteries it was the practice to keep a *Chronicle*. According to Bishop Tanner, this duty was performed by persons specially appointed to take notice of the principal events of the kingdom, and at the end of every year to digest them into annals. The chroniclers did not, however, confine themselves to the events of their day, but vied with each other in giving their registers some remote period of commencement, such as the Birth of Christ, the Deluge, the Beginning of the World, or some event alleged to be of almost equal antiquity in the fabulous history of Britain. The narrative is usually meagre, consisting for the most part of scriptural and royal genealogies, until the writer approaches his own times, when he becomes more copious and particular as his materials multiply, and it is unnecessary to state that, as a general rule, his credit may be said to increase in the same ratio with the minuteness of detail. As records of contemporary events, monastic chronicles are of the greatest value to the historian: of their genealogical utility, some instances will presently be given: here it is only necessary to state on the authority quoted above, that in them the monks "particularly preserved the memory of their founders and benefactors, the years and days of their births and deaths, their marriages, children, and successors."(r)

\*The *Register* properly relates to matters belonging to the internal economy of the monastery, containing, for [ \*574 ] example, a list of its members, and an account of its possessions, (as lands, villeins, and stock,) and revenues; but the name is often applied as a generic term to all monastic records. Documents bearing the title, have been found to contain notices of patrons' families, entries of their marriages, and lists of persons buried within the monastery. In a register of Abingdon Monastery there is a description of the office of chanter or precentor, in which it is said, that upon the decease of a monk, his name ought to be registered by the provision of this officer in the martyrology.(s)

In the *Chartulary* were enrolled all charters relating to the property of the monastery. This record very generally commences with a history of the foundation, and an account of the founder's family; after which follow in the order of time copies of the charters granted by them, and the other patrons of the house, and the archbishop's confirmation of them; of the Pope's bulls, and their definitive sentences concerning the disputes arising about their lands and tithes.

The *Leiger Book* seems to be the same with the chartulary; at least no points of difference have been discovered. It seems likewise to have been called a voucher, which was a general register book.(t)

The *Necrology* or *Obituary* is a register of the times of death of persons who, either by their rank or connexion with the monastery, were recommended to the notice of the registrar: as kings, bishops, abbots,

nium omnino monasteriorum, præsertim antiquorum natales et origines consignarunt; quo fundatores, qua occasione, quo Rege, quo Episcopo cœnobis fuerint erecta: seriem ipsam abbatum a primo ad ultimum posuerunt.

(r) In the Prologue to the Annals of Winton, by Thomas Rudborn, a monk of Winton, he says, that he composed that short book concerning those kings and other great men of the kingdom, who were the founders and benefactors of the English Church, by an inspection of the Monastic Chronicles. Wharton's Ang. Sac. vol. i. p. 287.

(s) Cotton MS. Claud B. vi. f. 193.

(t) Gutch's Coll. Cur. Vol. ii. p. 175.

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and peers of note, monks, and benefactors of the house.(u) It was sometimes made to serve the same religious use as the Martyrology. Thus, in a charter of the abbot and monks of St. Albans to Sir John [ \*575 ] Say, dated 1476, \*they promise that as soon as they should have certain notice of the hour in which it should please the Author of Life to command their souls (viz., of Sir John Say, his wife and posterity) to migrate from the world, they would cause their venerable names to be inscribed in their *obituary*, and, every year, upon the day returning, would recite the same in their chapter-house.(v)

The *Martyrology* was originally a calendar, in which were set against particular days the names of the saints and martyrs to be thereupon commemorated.(w) Afterwards, where the monastery either held lands by divine service, or for some consideration had granted the benefit of religious offices to certain persons, (of which instances have been given above,) and a performance of services was required at stated periods:(x) in such cases, the monks entered in their martyrology, as being a book in daily use, and devoted to the purpose of commemoration, the names of the persons to whom the services were due, against the day on which the same ought to be performed.

Sometimes the book was known by the simple name of the *Calendar* or *Journal*, though it contained the matter and was put to the use of a *Martyrology*.(y)

In the larger monasteries, where most or all of these records were kept, it was by no means the invariable practice in making entries to confine each volume to its proper department; and in the smaller religious establishments, which possessed but one, two, or three kinds of records, it was usual to call them by particular names of chartulary or leiger-book, or the general ones of chronicle or register, and to [ \*576 ] enter in them not only such \*matters as lay within the original province of documents bearing those titles, but such also as more properly belonged to that of some other description of record. The effect of this irregularity is, that there are none of the kinds of records above mentioned with which the genealogist is unconcerned; and this will appear from the variety of the sources where the instances of utility hereafter to be given are collected.

The monasteries were also the *officinas* of several records possessing genealogical interest which do not fall under any of the foregoing descriptions.

Besides entering their patrons' pedigrees in some of the books of the monastery, the monks sometimes exposed them in their chapter-house, in a separate form, drawn out upon decorated rolls of parchment.(z)

(u) Gutch's Coll. Cur. Vol. ii. p. 176.

(v) Madox Form. Angl., p. 336.

(w) Disceptatio Historica de antiquitate Benedictinorum in Angliæ Martyrologiis, 127. In Martyrologiis, sive emortualibus libris, in quibus quotidie pronunciabantur obitus, qui singulis diebus contingissent, sive sanctorum, sive fratrum et familiarium, sive benefactorum; ut primos orarent, pro aliis preces funderent. And see *Festis Sanctorum*. Du Cange v. Martilegium.

(x) As in the cases of divine service put by Littleton "to sing a masse everie Friday in the weeke for the soules, &c., or every yeare at such a day to sing a placebo et dirige, &c." Litt. Ten. s. 137.

(y) See Gutch's Coll. Cur. vol. ii. p. 175. From a Tract on the books used in churches and monasteries, &c., here in England before the Reformation, by J. Lewis, Minister of Margate.

(z) Dallaway's Heraldry, p. 114.

Thus upon the dissolution of monasteries, a metrical genealogy of the founders of the house was found hanging in the priory of Stone, in Staffordshire.(a) The pedigrees, not only in these rolls, but also in the books, were occasionally in verse. There is among the records of Wyrksop Priory, a rhyming pedigree of the family of Furnivall, (subsequently merged in that of Talbot,) who were the founders of the priory. It is headed, "Stemma Fundatorum Prioratus de Wyrksop," but the body of it is in English, in stanzas of seven lines. The details are extremely copious, comprising the exact genealogy of the family, notices of its different members, with the most celebrated actions of their lives, the names of the places where they were buried, and sometimes copies of their epitaphs.(b) An equally curious genealogy of the Clare family occurs among the records of the priory of Stoke Clara, in Suffolk. It is written in Latin and English verse, and is in the form of a dialogue between a layman and a friar; the former seeking, and the latter communicating information respecting the founder of the priory and his descendants.(c)

\*A practice existed in France of depositing in monasteries contracts of marriages, *chartæ nuptiales* or *chartæ conjugales*. [ \*577 ] It was originally a right of the lord to be the depository of these contracts, but he commonly confided the care of them to a neighbouring abbey; an instance of which is given in the *Nouveau Traité de Diplomatique*,(d) where a lord remits for himself and his vassals to the abbey of St. Allire de Clermont, in Auvergne, all the contracts of marriage of which he was the depository. Not only have no traces of this custom(e) been discovered in England, but, excepting where the alliances of families are mentioned in the course of their pedigrees, entries of marriages hardly ever occur in monastic records; and in a perusal of them this is the more striking, as separate entries of births and deaths are quite frequent. One instance, however, may be adduced from Tintern Abbey Register,(f) where there is entered a series of marriages in the same family. The chartulary of St. John of Jerusalem is said to afford another, in an entry of the solemnization of a marriage which took place in the priory.(g) It may be remarked, that entries of baptisms are equally rare; and this would lead to the supposition that the blank which the books of the monasteries present on these subjects, was owing to the well-known jealousy which the monastic order entertained of the secular clergy, to whom the celebration of the rites of baptism, and marriage belonged.

In 1268, the monks of Dunmow Parva enter in their chronicle that in that year Robert Fitzwalter (a member of their patron's family) "proved his age by Hugh the prior, and by our chronicles."(h) An

(a) A copy is preserved in the *Monasticon*, vol. vi., part i. p. 230. It is called, "The Copie of the Table that was hanging in the Priory of Stone at the time of the suppression of the same in the xxix. yeare of the Raigne of our Sovereign lord king Henry the VIII."

(b) *Mon. Angl.*, vol. 6, part i., p. 122.

(c) *Mon. Angl.*, vol. vi., part iii., p. 1600.

(d) *Tom.* 1, p. 393.

(e) Family evidences in general were sometimes lodged in the monasteries for the sake of preservation. An instance is cited from the Year Books in Tanner's *Not. Mon. Prof.* p. xi., note. See *Plowd. Rep.* 511, cited *ibid.*

(f) *Harl. MSS.*

(g) There is a copy of the entry in *Burn on Par. Reg.*, p. 133.

(h) *Eodem anno* [1268] Robertus filius Walteri statum suam probavit per dominum Hugonem Priorem tunc electum Londoniensem et per cronicas nostras. *Mon. Angl.*, vol. vi., part 1, p. 145.

entry of the birth of this Robert occurs in the same chronicle nineteen years before;(i) and it seems, therefore, probable that the purpose for which he required proof of his age was a claim of exemption on the [ \*578 ] ground of minority, from some \*service or charge. In making the second entry the monks appear to have had no other object than to record their venial pride, that their industry had proved of essential service to their patrons.

Not many years after, in the 25th of Edward 1, the chronicle of a monastery was made use of in proving the full age of the heir of a tenant in *capite*. In the *probatio ætatis* of Robert de Tony, son and heir of Ralph de Tony, a witness deposed that this Robert was born at Thornby, in Scotland, but that twenty years before that time, his mother bringing with her her son, then one year old and more, came into England to Westacre Priory, in Norfolk, of which her son's ancestors had been patrons; and that immediately upon his first coming, the year and day of the birth of the said Robert were written in the chronicle of the same priory, which chronicle he, the witness, had seen and read. Many other witnesses concurred in this testimony, excepting that they had not seen the chronicle; whereupon the said Robert had seisin of his lands and tenements.(j)

Records of monasteries were resorted to in several instances, in some of them for genealogical proof, on the occasion of the controversy between Scrope and Grosvenor, in the reign of Richard 2.(k) This suit, the most celebrated of those family feuds, which were common in the fourteenth and fifteenth centuries, respecting the right to particular armorial bearings, lasted from 1385 to 1390; and during this period evidence was taken in various parts of the country, before commissioners appointed by the Court of Chivalry. The following are extracts from the deposition of John de Yeversley, canon and celerer, and John de Queldrike, canon and sacristan of the priory of Bridlington, in Yorkshire. (It may be observed that the suit partly turned on the respective antiquity of the two families.)

[ \*579 ] “They were sent by their prior, and being severally sworn and examined, and being asked if they had heard of the ancestors of the said Sir Richard Scrope, said yes, for their priory has possessions of the gifts of the said ancestors, which they proved by many charters, sealed with large ‘solemn’(l) seals, and within the seals, knights sitting on horseback, with spears in their hands, like those used at the Conquest.” After exhibiting other charters of divers persons deceased, “they said that one Hugh le Scrope, ancestor of the said Sir Richard Scrope, [party to the suit] was in their time; and they showed by chronicles that he lived in the fifth year of King Stephen. And also the said canons showed us a book of chronicles, in which book are found the names of

(i) 1249. *Natus est Robertus filius Wakeri patronus de Dunmowe apud Henbam.* Ibid.

(j) Trin. 25 Edw. 1, rot. 36. *Abbreviato Placitorum* (Record Comm.) p. 293.

(k) Perhaps there is not extant a more interesting record of the fourteenth century than the proceedings in this controversy, or as they are usually called, the Scrope and Grosvenor Roll. Many hundreds of witnesses were examined on both sides, amongst whom were the most renowned men of the age, Geoffrey Chaucer, Hotspur, John of Gaunt, &c. The depositions of the ecclesiastics (of which examples are given in the text) strikingly exhibit the superiority of their sources of information. The Roll has lately been printed in a sumptuous manner for private distribution under the care of Sir Harris Nicolas.

(l) “Solempnes.”

the Scropes, of the time of those who bore the name of Gant, who came into England with the Conqueror." And after speaking to the appearance of the arms in question, in glass windows, in their church, they deposed that "the said Scropes and their ancestors have been in continual and peaceable possession [scil. of the arms] *without default of heirs male of them begotten, as they have found by their chronicle of benefactors to their priory since the Conquest.*"(m)

It will be observed, that the last extract affords an early instance of the proof by means of a monastic record of an important genealogical fact, the subsistence of a family in the direct male line. In the evidence of the Abbot of Selby, another species of record was appealed to for proof on a subject nearly akin to genealogy. He deposed that "there was in their abbey an old book with colours depicted, quite full of escutcheons of the arms of kings, princes, earls, barons, bannerets, knights, and esquires, and in the same book were the names of each lord, written above *his* arms, and of each baron [ \*580 ] and banneret, and of knights and esquires; among which were found the arms of the Scropes, azure a bend or, and their name written above; the making of which book was not in memory."(n)

In the claim of Margaret Fenys to the barony of Dacre, which was referred by King James 1, to the commissioners for exercising the office of Earl Marshal, there was received in evidence "a pedigree, taken out of an old book, remaining now with my Lord William Howard, sometime belonging to the priory of Lanercost."(o) From other parts of the proceedings,(p) it appears that the old book was the leiger book of the priory, and that the pedigree in it was thus headed, "*Hæc sunt nomina baronum et dominorum de integrâ baroniâ Gillelandie, et dominorum parliamenti a Conquesta Angliæ, ac fundator. istius monasterii.*" It was put in evidence to prove, by the following entry, the marriage of Matilda, the heiress of the family of Vaux, with Thomas Multon. "*Matildis de Vallibus filiæ Huberti de Vallibus, Thomas Multon maritus dicte Matildis sextus dominus parliamenti.*"

No other instances have been met with of the admission of monastic records for legal proof in matters of pedigree. The following are a few examples, (which might easily be multiplied), of their citation by our best genealogists. Of course they are not offered as authorities for the admissibility of the records, but only to illustrate their utility and importance.

The great chartulary of the Percy family at Sion, and also the chartulary of Whitby Abbey, to which that family were great benefactors, are frequently cited by Collins, in the Percy pedigree.(q)

(m) Scrope and Grosvenor Roll, vol. i. p. 102, vol. ii. p. 282. The passage last cited is erroneously translated in the second volume; it is rendered "continual and peaceable possession without default of heirs male; and as appears by their chronicle, were benefactors to their said priory since the Conquest;" thus misrepresenting the fact proved by the chronicle, which was not the patronage of the priory by the Scropes, but their peaceable possession of the arms without failure of issue male. The original is as follows:—*Et les ditz Scrope et ses auncestres ont este tuediz en continuel et peable possession sanz default de heir mal de eux pourcez come ils ont trovez plour croniky' de bien faiso's a lour dit priore depuis le gquest.* Vol. i. p. 102.

(n) Scrope and Grosvenor Roll, vol. i. p. 92, vol. ii. p. 271.

(o) Collins on Baronies, p. 33.

(p) See p. 47.

(q) Collins Peer., vol. ii. p. 222, et seq. Sir E. Brydges's ed., 1812.

The chronicle of Alnwick Abbey is twice cited in the pedigrees of the same family; once in proof of the time of death and burial in Alnwick Abbey of one of the family, and another time to prove the fact of another member having had issue.(r)

[ \*581 ] \*A genealogical document in the British Museum, Harl. MSS. 692, relating to the Percy family, is said to be extracted "*ex Registro Monasterii de Whitby.*"(s)

The same author cites the register of Wyrksop, in proof of genealogical facts in the history of the family of Talbot, Earl of Shrewsbury.(t)

One monastic record deserves a particular notice, on account of the purpose for which it has often been cited. Soon after the Conquest, the monks of the Abbey of Battle (a monastery so called from having been founded by the Conqueror on the field of the battle of Hastings,)(u) are said to have compiled a list of the principal followers of William into England. This record, thence called the Battle Abbey Roll, is therefore commonly referred to by old genealogists in proof of the Norman origin of families. But its history is obscure, and its authority has long been considered doubtful. None of the copies extant are of an earlier date than the fifteenth century; and they differ, one from another, to the extent of nearly two hundred names. Dugdale thus explains the difference: "Such," he says, "hath been the subtilty of some monks of old, that finding it acceptable unto most to be reputed descendants to those who were companions with Duke William in that memorable expedition, whereby he became conqueror of this realm, as that to gratify them, but not without their own advantage, they inserted their names into that ancient catalogue." He also states it as his opinion that "there are great errors or rather falsities in most copies, by attributing the derivation of many from the French, who were not at all of such extraction, but merely English; as by their surnames taken from several places in this realm, is most evident."(v) Camden's opinion is yet stronger against its credit. He does not proceed upon falsification, but seems to deny the existence of any original record. He says, "Whosoever considereth it well, shall find it always to be forged, and those names to be inserted which the time in every age favoured, and were never mentioned in the notable record of Domesday."(w)

[ \*582 ] In this latter statement, however, he is contradicted by Sir Henry Ellis, who informs us that, exclusive of a few interpolations, the names in the Roll will for the most part be found among the under-tenants of the survey.(x) Yet it must be remembered that a correspondence with Domesday, either partial or entire, is quite reconcilable with the want of authenticity in the Roll; as it would be easy for the compilers of the latter, to make it tally to whatever extent they pleased, with the national survey.

Of this record several ancient MS. copies are in the British Mu-

(r) Ibid. p. 247.

(s) Coll. Peer., vol. ii., p. 279.

(t) Vol. iii. p. 16, 17.

(u) Camden's Britt. i. 249.

(v) Baronage, pref. p. v.

(w) Camden's Remains.

(x) Introd. to Domesday, pref. p. ix. Sir Henry omits to state which copy of the Roll he adopts, and by what standard the interpolations are to be determined.

some (y) and probably in others of our MS. libraries; (z) copies also varying more or less from each other, are printed in the Chronicles of Brompton, Holinshed, and Stow. Duchesne prints two different lists at the end of his Normannici Scriptores, and two lists are also given in Fuller's Church History, and in Banks's Dormant Peerage. Some of the lists, as that in Brompton, are in rhyme.

Whilst upon the subject of Norman origin, it is proper to state that there are extant several rolls of the Conqueror's companions besides those bearing the name of Battle Abbey. It is said that the oldest of these is a list in Wace's Chronicle of the Dukes of Normandy, which is preserved in the royal collection in the British Museum. (a) Sir Henry Ellis, in his Introduction to Domesday Book, (b) has printed such extracts from it as comprise the names. The royal collection also possesses another Roll of William's followers written in 1436; (c) and the Harleian contains a third, having an alphabetical index, and headed as follows: "These be the surnames of the persons of reputacons that entered into England wth Willm Conquerer." (d) The last-named list is cited in Collins's Peerage under the Percy [ \*583 ] family. (e) Another of these lists is to be found amongst the Arundel MSS. in the College of Arms. (f) It is entitled, *Cognomina Conquestorum Anglie cum Dño Willmo Duce Normannie Conquestore Anglie.* (g)

## \*CHAPTER VII.

[ \*584 ]

### INQUISITIONS POST MORTEM, SCOTCH RETOURS, ETC.

THE Monastic Registers above treated of, related only to the families of founders and benefactors of religious houses: the sphere of their usefulness therefore must always have been comparatively circumscribed; to waive the question of their legal authority. The genealogist will derive much greater assistance from the inquisitions taken after the death of tenants *in capite*, (a class comprising at one time almost all men of property in the kingdom,) in which the death of the deceased tenant, and the name and age of his heir, were found by a jury, and returned of record in a manner which will be afterwards mentioned. A genealogical utility, unequalled by any later institution, has been ascribed to these proceedings by very high authority. "Perhaps," says Lord Erskine, "while the feudal tenures pre-

(y) Lansdowne MSS. 255, fol. 117, containing two lists, one from the Norman Chronicle; Lansdowne MSS. 446, fol. 15, and 882. There is also a chronicle of Battle Abbey, Cotton MSS. Nero D. ii. 234, b.

(z) There is one among the Arundel MSS., in the Col. Arm. No. ix. It is said (Cat. p. 15) to be an incorrect copy from Brompton, in Twysden's Scriptores Coll. 963-5.

(a) MS. Reg. 4, c. xi. fol. 246.

(b) Pref. p. ix. n.

(c) MS. Reg. 14, B. i.

(d) Harl. MSS. 293.

(e) Ed. 1812, vol. ii. p. 219.

(f) No. xlviii.

(g) There is appended to Robert of Gloucester's Chronicle, as printed by Hearne, a metrical "Petegreue fro William Conqueror of the Crowne of Engelonde, lynnyally descending un to King Henry the vj." Hearne describes and prints it in his Appendix, p. 585-595. A more genuine copy of these verses is in the Cottonian Collection, MS. Julius, B. iv. fol. 1-8, which has with great probability been ascribed to Lydgate.

vailed with the ancient inquisitions *post mortem*, opportunities of establishing descents were afforded, much superior to the modern means by the register of births and baptisms. The heads of houses upon these occasions made solemn declarations, which were matter of record, and threw great light upon questions of inheritance." Lord Mansfield's testimony is still stronger: "The proof of pedigrees has become so much more difficult since inquisitions *post mortem* have been disused, that it is easier to establish one for five hundred years before the time of Charles 2, than for one hundred years since his reign."

Upon the death of each tenant *in capite* of the Crown, a jury was summoned to inquire; First, Of what lands the party died seised? Secondly, By what rents or services the same were held? Thirdly, [ \*585 ] Who was his next heir, and of what age the said heir \*then was? The inquest was taken upon oath, and the verdict, under the seals of the jury, was returned to the officer by whose summons the jury was assembled.(a) This duty appears first to have belonged to the justices in eyre, but was afterwards transferred to the escheators, officers appointed by the crown for the purpose. King Edward 4 ordained that the Sheriffs should be escheators in their several counties.(b), Inquisitions *post mortem* afterwards fell within the jurisdiction of the Court of Wards and Liveries, which was erected in the 32d and 33d years of Hen. 8.(c)

There were five different forms of writs issued by the Crown for taking inquisitions *post mortem*. The most common form was called the writ "*de diem clausit extremum*," which was issued immediately after the death of the tenant. The second was the "*de melius inquirendo*," where there had been no return, or an insufficient return to the former. The third was "*quæ plura*," where any of the land had been omitted. The fourth was "*devenerunt*," where the heir of the tenant died within age. The fifth was "*mandamus*," which was issued where a year had elapsed since the tenant's death before the issue of any writ.(d)

Sometimes writs of mandamus were directed to special commissioners instead of the usual writ to the escheator.

When the value of the lands to be inquired of was under five pounds per annum, the inquisition might be taken by the escheator without a writ, *virtute officii*.(e) In every case the inquisition was to be returned into the Petty Bag Office whence a transcript was sent into the Exchequer, to enable the King's officers to collect the duties and services payable to the king.

[ \*586 ] The earliest inquisitions *post mortem* on record,(f) are of the \*reign of King Henry 3. They are continued

(a) By 1 Hen. 8, c. 8, Inquisitions *post mortem* are required to be taken on the oaths of twelve men, and in open places.

(b) Stat. 29 Edw. 1; 14 Edw. 3, st. 1, c. 13, and 18 Hen. 6, c. 7, relate to Escheators.

(c) Stat. 32 Hen. 8, c. 46, and 33 Hen. 8, c. 22, relate to Wards and Liveries.

(d) Fitzh. Nat. Brev. by Redman, 1535, p. 219.

(e) Powell's Att. Ac. 1630, p. 226.

(f) In the Harl. MS. No. 624, is a copy of some Inquisitions of earlier date, certified by Sir Simonds D'Ewes and Roger Dodsworth, as having been compared by them with the originals, on Thursday, 3rd May, 1643. They have been published by Mr. Grimaldi, under the title of "*Rotuli de dominabus et pueris et puellis in donatione Regis in XII. comitatib.*"

until the restoration of Charles 2, when the practice of taking them ceased, in consequence of the abolition of military tenures, together with the Court of Wards and Liveries to which they had given rise.(g)

The practice of the juries in stating their finding, on the third of the heads of inquiry to which their attention was directed, appears to have been by no means uniform. They always stated indeed who was the heir, but did not always state in what degree he was related to the deceased. Perhaps this was out of their power in cases of remote consanguinity. Judging from the frequency of the descriptions "*fil. et hæc.*," and "*frat. et hæc.*," it was probably customary to express the relationship where it was so near; but when a more distant kinsman succeeded as heir, this was not so regularly done. Sometimes a particular relationship is expressed, as the case might be; at other times general consanguinity is stated, and the heir is styled, "*cous. et hæc.*" Occasionally, the steps in the pedigree are enumerated;(h) but the inquisitions are too frequently altogether silent on the subject, describing the heir merely as "*prox. hæc.*"

The jurors were sometimes unable to ascertain the age of the heir, and in such cases they alleged their ignorance, with, perhaps, the reason for it; as, that the heir was born in foreign parts. In the great majority of cases, however, the age of the heir is mentioned. The time of the tenant's death, and the name and age of the heir, were the only facts immediately relating to the subject of pedigree, which the jurors were expressly directed to ascertain. But inquisitions often contain other matter incidental to those facts, of great value to the genealogist. Of this nature are the statements of the several steps of a pedigree, which were sometimes introduced, as also the statements of the survivorship of a widow entitled to dower. Besides such notices, it was common to recite the wills of the deceased; many cases occur of wills recited in inquisitions *post mortem*, which are not to be found in the register of any Court Christian.(i) It was also the practice to recite family deeds and charters in these inquisitions, instances of which occur in inquisitions produced in the Roos.(j) and Devon claims of Peerage.

The earlier inquisitions *post mortem* are deposited in the Tower. They commence in the 20th of Hen. 3, but the series is by no means regular till the 26th of his reign; from which period they are continued to the end of the reign of Ric. 3.(k) There are official calen-

des Lineolnseir, Norhamptonsire, Bedefordsire, Bockinghamsire, Roteland, Hunterdonsire, Norfolk, Sudfolk, Hertfordesire, Essex, Cantebrigesire, Middelsex; de itinere Hugonis de Morewik, Radulfi Murda Willelmi Vavassur et Magister Thome de Hepburn, Anno 31 Hen. II., 1185." They contain abstracts of inquisitions taken in 1185, for the purpose of ascertaining the wardships, reliefs, and other profits due to the King from widows and orphans of tenants in *escheat*, minutely describing their ages and heirships, their lands, the value of them, the beasts upon them, and the additional quantity necessary to complete the stock. There are only four earlier records than these Rotuli, viz. 1. Domesday Book; 2. Chartæ Antiquæ temp. W. 1; 3. The Pipe Rolls, which commence in the reign of Stephen; 4. The Black Book of the Exchequer, of the date of Henry II.

(g) 12 Car. 2, c. 24.

(h) Many steps of a pedigree are enumerated in an Inquisition taken upon the death of Sir Thomas Gray in 1617.

(i) Powell's Rep. of Rec. 1631, p. 6.

(j) Min. Ev. 81.

(k) Rep. Pub. Rec. Com, 1837. Appendix, p. 69.



dars of these instruments arranged in counties; and general calendars of them have been printed in four folio volumes, under the direction of the Commissioners of Public Records.

The volumes of the printed calendar are chronologically arranged. Volume 1 contains the inquisitions from Henry 3, to the end of Edw. 2. Volume 2 contains all of Edward 3. Volume 3 contains Ric. 2 and Hen. 4. Volume 4 contains Hen. 5, Hen. 6, Edw. 4, and Ric. 3. They present the number of the inquisition, the name of the party on whose death the inquisition was taken, the names of all the lands mentioned therein, with generally a notice if the tenant was a felon or an idiot. To each volume are appended copious *indices nominum et locorum*. The public utility of these calendars has, however, been very materially contracted, by the omission of the name and age of the heir.

The inquisitions mentioned in the printed calendar were not all [ \*588 ] inquisitions *post mortem*; there are numerous *inquisitiones ad quod damnum* contained amongst them. This is most commonly the case with respect to the second numbers; caution, therefore, is necessary in the examination of the calendars, to guard against mistakes.(l)

An inventory of all the inquisitions *post mortem*, and *ad quod damnum*, in the Tower, has been made, and they are so arranged, as to be readily accessible for consultation.(m)

The inquisitions *post mortem* subsequent to the reign of Ric. 3 are preserved in the Rolls Chapel. They are officially intitled "The Escheat Bundles," and commencing in the 1 Hen. 7, are regularly continued to the 20 Charles 1. Amongst those documents are also a few inquisitions taken upon writs *de lunatico inquirendo*, inquisitions taken *virtute officii*, and other inquisitions or offices finding titles in the crown after that period.(n) There are complete indexes for each year, of the names of persons, alphabetically arranged, with references to the bundles and numbers of the inquisitions, but no office indexes or calendars of places.(o)

There are other inquisitions *post mortem* which, having been returned into the Exchequer, were deposited in the King's Remembrancer's Office; others were in the Office of the Lord Treasurer's Remembrancer. They have all recently been removed to the Carlton Ride. From the beginning of the reign of Hen. 7, they have been collected together, and arranged in chronological order; and calendars have been made of the names of the persons to whom they relate.

[ \*589 ] \*Amongst the MSS. in the British Museum, is a book in folio, containing short notices of several thousand inquisitions taken from Hen. 3 to the 14th Edw. 4, with an index of names

(l) Nicolas on the Public Rec., p. 78. (m) 4th Rep. of Dep. Keep. of Rec., p. 26.

(n) 1st Rep. of Select Com. on Pub. Rec. App.; Rep. Pub. Rec. Com. 1837, App. p. 112.

(o) The late Mr. Kipling, on his return to the Order of the Select Committee of 1800, stated, that he had among Mr. Rooke's collection of Manuscripts, Calendars, or Indexes of Manors and Lands, alphabetically arranged, referring to the names of persons to whom liveries were granted of the estates of their ancestors, and containing the names of the ancestors, and the times at, or about which they died, by which means, many of the inquisitions, *post mortem*, may be readily referred to by searching the Office Calendar under the names of those ancestors. In his further return, Mr. Kipling recommended that all the Office Indexes to these inquisitions should be printed for public use. (First Report from the Select Committee of the House of Commons upon the Public Records, p. 86—86.)

at the end. This volume would be useful in tracing ancient pedigrees. It is said in the catalogue to be in the handwriting of Robert Glover, Somerset Herald.(p)

In the Public Library at Cambridge, there is a book containing inquisitions *post mortem*, taken in the county of Cambridge, from the 13 Car. 1 to 1639. There is also a volume entitled "A Booke of Inquisitions taken at Cambridge and Huntingdon, by the Escheator, 1637, 1638, 1639, and 1644."

In an old case, it was said that the reason why an inquest *post mortem* may be read is, because of the antiquity of it, or to prove a pedigree.(q) The correctness of this *dictum* may, however, be doubted. A deed by its antiquity proves itself; but this is not the case with an inquisition *post mortem*; the necessity of proving the authority under which the inquisition was taken, sufficiently shows that its admissibility depends upon something more than its antiquity. Neither are these records allowed as evidences of pedigrees under the rule before mentioned, peculiar to that species of evidence. The true ground of their admissibility is the fact that they are the results of inquiries made by virtue of competent public authority.

It has even been said in cases of inquisitions *post mortem*, and such private offices, you cannot read the return without reading the commission.(r) This statement appears to be too general. It is true that it has been held that an inquisition *post mortem* cannot be read in evidence, unless it be proved that a commission was issued to warrant it;(s) but it has also been decided upon the same authority, that an old inquisition *post mortem* may be read without producing the commission upon which it is issued; but that it is necessary to prove that such a commission did actually issue, which may be done *vivâ voce*.(t)

\*In Peerage claims, in which, much more frequently [ \*590 ] than in cases of any other nature, recourse is had to the evidence of inquisitions *post mortem*, it seems to be the settled practice of the House of Lords to require the production of the commission. The original commission with the inquisition must be produced by the officer in whose custody it is. And, except perhaps in the case of an Irish inquisition,(u) certified copies of the inquisition will not be admitted. Thus, in the Vaux case, where an attested copy of an inquisition taken in Durham, was tendered, the counsel were informed that the original, being in England, must be produced.(v)

Even when the authority for taking the inquest is satisfactorily shewn, yet if there appears to have been any irregularity in the proceedings, the evidence of the inquisition will be rejected. Thus, in the case of the Barony of Powis, A. D. 1731, three inquisitions *post mortem* were produced; but as the finding of the jury in two of them had exceeded the authority conferred by the writ, and a *supersedeas* had issued and vacated a third, and it appeared that the Court of Wards had declared them insufficient, they were rejected.(w)

But though an inquisition which has been declared void will be reject-

(p) Cod. 2087, art. 1, 2, 3.

(q) Per Pratt, J., Jones v. White, Strange, 68.

(r) Newburgh v. Newburgh, 3 Bro. P. C. 553.

(s) See post.

(t) Cruise on Dign., c. 6, s. 60.

(r) Bull. N. P. 228.

(s) Anderton v. Magawley, ib. 538.

(v) Vaux Barony, Min. Ev. 67.

ed, one that is merely voidable may be received. Thus in the case of *Leighton v. Leighton*,<sup>(x)</sup> upon a trial at bar, the defendant made title under an old entail, and amongst other things offered an inquisition *post mortem* in 25 Hen. 8, whereby it was found that the deceased tenant was seised in fee, and upon traverse of this, it went down to be tried, and found to be only a seisin in tail, upon which judgment was given, and an *amoveas manus* issued. This was objected to by the counsel for the plaintiff, because it was taken and tried in the county of Salop, whereas the lands lay in Wales, and this being before the 27 Hen. 8, c. 26, which united Wales and England, it was *coram non judice* and a *mistrial*. But the court ordered it to be read, saying it was not void, but voidable.

[ \*591 ] \*And if the inquisition has been acted on, it seems that irregularity appearing on the face of it, will not render it inadmissible, but the court will presume in favour of its regularity.<sup>(y)</sup> In the case of *Millar v. Collumbine*, a trial at bar in trespass and ejectment, Rolle, C. J., held that an office which is found after the death of one that died seised of *capite* lands in a county wherein the lands found in that office do not lie, but in another county, may, notwithstanding it was not found in the county where the lands do lie, be given in evidence to a jury that is to try the title of those lands, if there were a special livery granted unto the heirs of those lands, for this presumes that there was a special direction for finding this office in this extraordinary way.

The mention or recital in inquisitions *post mortem* of deeds, wills, charters, &c., is such evidence of the existence and tenor of those documents, that it will be sufficient to prove any fact which might have been proved by the documents themselves. Thus in the Devon claim of Peerage, there was put in evidence an inquisition *post mortem* which recited, that a charter of 10 Hen. 5, from Hugh Courtenay, granting lands to Hugh Courtenay, "*avunculo suo*," was exhibited to the jury: and this was allowed as proof of that relationship existing between those parties.<sup>(z)</sup>

So at law, an inquisition *post mortem*, setting out the tenor of a deed was held to be evidence of the deed.<sup>(a)</sup> And an inquisition *post mortem* on the death of Isabella de Hastings was put in, to shew that she was wife of Sir John de Hastings, by her holding in dower lands which had been his.<sup>(b)</sup>

The form of the writ, without the return of the jury, will in some cases afford a sufficiently strong presumption of the period of the tenant's death. Where for instance the writ was "*diem clausit extremum*," it is indicative that the tenant died within a year preceding the date of the writ. Thus in the Devon claim of Peerage, to prove that Sir Hugh Courtenay died in the eleventh of Edward 4, a writ of [ \*592 ] "*diem clausit extremum*" was put in evidence, \*reciting "*Quia Hugo Courtenay Miles, qui de nob~ tenuit in capite, diem clausit extremum ut acceptimus*."<sup>(c)</sup>

On the other hand, where the writ was "*mandamus*," it is equally

(x) *Strange*, 308.

(y) 1 Lill. P. R. 552.

(z) Appendix, p. 24.

(a) *Burridge v. Earl of Essex*, 2 Lord Raym. 1392.

(b) *Hastings Barony*, Min. Ev. 341.

(c) Appendix, p. 26.

certain that the death must have occurred more than a year previously.

Inquisitions *post mortem*, though admissible, are not conclusive evidence. This was observed by Lord Hardwicke, in the case of *Sergison v. Sealey*; (d) and Lord Redesdale, in the case of the *L'Isle Barony*, where an inquisition *post mortem* was relied on to prove the death without legitimate issue of Sir R. Dudley, said that inquisitions are far from being decisive; and he instanced the case of Lord Powis, where there were two inquisitions expressly contradicting each other. (e)

The findings of the jury were in fact often contradictory, and therefore contrary to the truth. (f) Of this there is sufficient evidence in the numerous cases of interpleader which occur in the Year-Books and old reports. Where two parties had been severally found heir to the same person, as the king could not know which had the better title, they were obliged to try the question of heirship by a suit of interpleader before either could obtain livery of the lands. This might occur in the case of one inquest, as where twins had been found heirs, (g) and the priority of birth was doubtful: or more commonly in the findings of different juries in different counties. (h) Sometimes also the inquisitions taken under writs "*de melius inquirendo*," contradicted those which had been previously taken. Thus in the *Banbury* case, the first inquisition taken on the death of the Earl of Banbury in 1632, found that he died without issue male, but a second inquisition taken seven years afterwards, found that Edward, then Earl of Banbury, was his son and next heir, and that he left another son named Nicholas. (i)

\*It has been said that it does not appear to have been [ \*593 ] necessary that the proof of heirship should come from relatives: (j) and the evidence of strangers would obviously be more liable to error.

The evidence of inquisitions not being conclusive, it may be rebutted by presumptions arising from other circumstances. Thus the evidence of an inquisition reciting a grant of lands from Hen. 6 to the ancestor of the plaintiff, and the subsequent seisin of his descendant, was held not to be conclusive evidence of such seisin, but to be repelled by the operation of an act of resumption of 38 Hen. 6, vesting the reversion in the crown. (k)

The inquisitions *post mortem* which were taken within the Duchy of Lancaster, were kept in the office of that Palatinate. Of these about three thousand five hundred and sixty-nine have been found. The earliest bears date 34 Edw. 1, and the latest 18 Car. 1. A calendar of them has been published under the authority of the Record Commissioners, bearing the title of "*Ducatus Lancastriæ Inq. post*

(d) 2 Atk. 412. See *Ekin v. Pigot*, 2 Eag. & Y. 95.

(e) *L'Isle Barony*, Min. Ev. 123.

(f) In the preface to *Tanner's Notitia Monastica*, p. xix. n. (f), several instances are collected of erroneous findings by the jury as to the foundership of religious houses.

(g) *Staunf. Præf. Reg. tit. Interpleader*; Trin. 1 Hen. 7, 28, cited there.

(h) Case cited, *Abbrev. Placit.*, p. 309; Mich. 3 Edw. 2, Rot. 126.

(i) *Cruise on Dign.* 281.

(j) *Vide Tract in Harl. MSS., Cod. 1323, 19.*

(k) *Earl of Thanet v. Forster*, Jones, 224.

*mortem*, &c. temp. Reg. Edw. 1, &c." This calendar presents the date of the inquisition, the name of the party on whose death it was taken, and the lands of which such party was seized, and adds also occasional entries that such party was attainted, outlawed, idiot, &c. Some of the inquisitions are also distinguished as "*probationes ætatis*," "*pro assignatione dotis*," &c.

From a short period after the Conquest, the prelates of Durham for four centuries exercised within, and co-extensively with, the limits of the Palatinate, every right attached to a distinct and independent sovereignty.<sup>(l)</sup> Amongst these was the paramount seigniorial property in all lands, with its feudal incidents, the privileges of escheat, forfeiture, and wardships. By virtue of the same powers, the prince bishops appointed by patent during pleasure, their own escheators, as well as [ \*594 ] other officers, to whom \*upon the deaths of the tenants of the see, writs of "*inquirendo post mortem*," in the bishop's name, were issued from the Episcopal Chancery. The Close and Patent Rolls of Bishop Bury, who was appointed to the see in 1333, are the earliest extant in the chancery at Durham, and exhibit specimens of all the usual writs, including writs "*de inquirendo post mortem*," differing little, except in the variation of the episcopal style, from those issued from the Royal Chancery.<sup>(m)</sup>

The statute 27 Hen. 8, c. 24, deprived the bishop of Durham, amongst other temporalities, of the right of issuing writs in his own name: but as that act did not interfere with the right of the Bishop to have his own Court of Wards, the inquisitions *post mortem* within the Palatinate, still continued under the separate jurisdiction, until the general abolition of the system of military tenures, when the Episcopal and Royal Courts of wards were swept away together. The inquisitions *post mortem* of the Palatinate are deposited in the registry of the Chancery of Durham.

The rolls of Bishop Bury, and of his three immediate successors, consist of parchment schedules tacked together at the top. Those of Langley and the succeeding prelates are on continuous rolls of parchment. When one side is filled, the further entries are written on the other, commencing the contrary way, and they are said to be "*in dorso rotuli*." There is no chasm in the rolls, and they have a sufficient index, very neatly written, about the time of Bishop Crewe, and continued to the present time.<sup>(n)</sup>

These inquisitions are admissible in evidence, but we have seen that, in the House of Lords, the originals themselves must be produced, and that a certified copy will not be sufficient.<sup>(o)</sup>

[ \*595 ] The regular series of Irish inquisitions *post mortem* commences \*in the reign of Elizabeth, and ends shortly

(l) It was a maxim with reference to the powers of the bishop, "*quicquid Rex habet extra, Episcopus habet intra*." "*Solum Dunelmense stola judicat et enc*." Surtees' History of Durham. General History, vol. 1, p. xvi. n. (A).

(m) Surtees's History of Durham. Gen. Hist. vol. 1, p. xlviii.

(n) Ibid. xlviii. n. (m) In the same work is given a copy of an inquisition *post mortem* "*virtute officii*," taken by the Escheator of the Bishop of Durham, upon the death of Richard 3, styled therein "*nuper rex Anglie de facto sed non de jure*." It recites that he had by Act of Parliament been attainted of high treason, and had forfeited his lands, &c. This inquisition is dated the second year of the Bishop, which was the first year of Henry 7. Vol. I., Appendix to General History, p. clxvi.

(o) Supra, p. 590.

after the Restoration. They are deposited in the Rolls' Office, and in the office of the Chief Remembrancer in the Court of Exchequer in Dublin. Catalogues of these inquisitions have been printed in the Supplement to the eighth report of the Record Commissioners for Ireland. (p) These catalogues give merely the number of the inquisition, the name of the party on whose death it was held, and the date and place of taking. (q) It is said that the inquisitions in the Chief Remembrancer's Office relate principally to the possessions of the dissolved monasteries. (r)

Under the authority of the Commissioners of Public Records a repertory of their contents has been formed. The first volume comprises the Repertory of the province of Leinster. It will be found in general to contain the date of each inquisition, and the place where taken; the name or names of the person or persons to whom it relates; the lands of which he or they was or were seized; their acreable or other contents, and real or nominal value; the time of his or their death; the heir or heirs, and his or their age or ages, and marriage; the tenure by which the lands were held under the Crown. The repertory of each county is preceded by a catalogue of its inquisitions, and followed by copious indexes of persons and places, in which the references are made to the number of each inquisition, placed according to chronological arrangement in each reign. A few inquisitions appear enrolled in the patent rolls of Chancery; these are not comprised in the repertory. (s) The second volume comprises the inquisitions in the province of Ulster.

\*In the Irish inquisitions *post mortem*, numerous family [ \*596 ] settlements, deeds, wills, leases, and other instruments, relating to property in Ireland, are set out at full length, or copiously recited, and of the greater number of these there are at present no other traces to be found. (t)

In the Slane Peerage case there was put in evidence an inquisition *post mortem* taken in the 29 Car. 2, an. 1676, on the death of Randall, Lord Slane. (u) It recited the death of his father and brother, and an indenture and deed poll, by which it was proved that William Lord Slane, was son of Christopher, Lord Slane, and that he died in the year 1641, leaving Charles, Lord Slane, his eldest son and heir; that Charles died s. p. in 1661, and was succeeded by his brother Randall; that Randall married, first, Elenor, daughter of Sir R. Barnwall, by

(p) pp. 432. 563.

(q) Cooper on Pub. Rec., vol. i, p. 341.

(r) The earliest Inquisition *post mortem* mentioned in the Catalogue of the Rolls' Inquisitions, bears date 5 Hen. 6, and was taken in the county of Louth. The earliest mentioned in the Chief Remembrancer's Office Catalogue is dated 36 Hen. 6. Many Inquisitions occur of a date prior to the reign of Elizabeth, and later than Car. 2.; the latest is dated 19th January, 1760. Most of these probably were not inquisitions *post mortem*. Appended to the Catalogue of Inquisitions in the Remembrancer's Office, is a short Catalogue of fifty-three Inquisitions in the Secondary's Office in the Exchequer. They are described as relating principally to the lands and possessions of the persons mentioned in them, and as being of a different nature from those in the preceding Catalogue, but their nature is not stated. The first is dated in the 25 Car. 2, and the 51st, 12 April, 5 Jac. 2.; the last but one is dated 18th May, 1689; the date of the last is illegible. 8th Rep. of Rec. Com. for Ireland. Supp. p. 612.

(s) Preface to the 1st Vol. of "Inqu. in Rot. Canc. Hib. Report."

(t) Pref. to Repertory, vol. ii.

(u) Slane Barony, Min. Ev., part 2, p. 3. This inquisition mentioned the passing of the Act for the Abolition of Military Tenures.

whom he had an only child, Mary, that he afterwards married Lady P. Moore, daughter of Henry, Earl of Drogheda, by whom he had three sons, Christopher, Henry, and Randall, and an only daughter, and that he died in 1676, and was succeeded by his eldest son, Christopher, Lord Slane.

In the same case an examined copy of an inquisition *post mortem*, taken at Navan, on the 18th January, 1625, upon the death of Christopher, Lord Slane, was produced by Mr. William Crawford, Athlone Pursuivant at Arms, who stated that he produced it from the Rolls' Office of the Chancellor of Ireland, and had himself examined it.(v) The commission does not appear to have been produced or called for, and the copy of the inquisition was apparently received without objection. So on the claim of James Redmond Barry to the Viscounty of Buttevant, in 1825, office copies of inquisitions *post mortem*, in the Rolls' Office of Chancery in Dublin, attested, one by the Master of the Rolls, and one by the deputy keeper of the rolls, and proved to be true copies, were received in evidence.(w)

[ \*597 ] As connected with the subject of inquisitions *post mortem*, and \*though not in all respects analogous, yet bearing a close resemblance to them, it is proper here to notice the *retours of services* in Scotland. According to the law of that country the legal character of "heir" in feudal property, together with the rights and obligations attached to that character, cannot be regularly created except by a solemn judicial act. The person who claims that character must procure a formal recognition of his title, by the procedure under a "*briefe of succession*." By that writ, the judge to whom it is addressed, is required to ascertain by the verdict of a jury the following points, viz. in what lands the person deceased was feudally invested at the period of his death: if he had died at the faith and peace of the king: if the bearer of the *briefe* be the nearest lawful heir of the deceased in those lands; if he be of lawful age; what is the annual value of the lands; of what superior they are feudally held; by what species of tenure; by whom they are at present possessed; and why, and how long they have been so possessed. To each of these questions a specific answer ought to be given by the jury, and their verdict, when drawn up and authenticated in due form, is called a *service*, and is with the original *briefe retoured* or transmitted to the office in Chancery, from which it issued, where it is recorded, and where an authenticated copy, commonly called the "*Retour of the service*," is delivered to the bearer of the *briefe*.(x) This species of service is called a "*service in special*," but without reference to investiture in any feudal property, it is sometimes desirable to establish the character of being by propinquity the nearest heir of a person deceased. For this purpose the forms of a "*service*" or "*briefe of inquest*," have been employed, which in contradistinction to the former, is termed a "*general service*," and is in like manner returnable to Chancery.

Where the succession consists of several subjects lying within differ-

(v) Slane Barony, Min. Ev., part 1, p. 13.

(w) Min. Ev.

(x) The original "*Retour*" was in early times returned to the heir, after being recorded: this is proved by the fact, that many such originals are now among the muniments of the families to which they relate.

ent jurisdictions,(y) a service ought to be expedited before the judge of each jurisdiction, for the subjects lying within it. \*The [ \*598 ] Court of Session, however, had long been in the use of granting commissions to their macers, in order that the service might proceed before them as judges in that part, without respect to the county in which the property was situated. By a recent Act of Parliament, 1 & 2 Geo. 4, c 38, this form of proceeding before the macers has been abolished, and the Court, in place of granting commissions to the macers, are authorized to grant a commission to the Sheriff of Edinburgh, or his substitute, before whom the service may proceed, wherever the lands lie.

It was required that the claim should specify the degree of propinquity through which the heir claimed to be served; and unless the inquest stated every link in the chain of propinquity, the service was liable to be set aside.(z) From the circumstances of this detail, the service would perhaps appear better entitled to credit, than the *ex parte* nature of the proceeding would otherwise have permitted.

In support of the heir's claim, certain points were to be presumed, unless direct proof of the contrary was brought before the inquest. 1st. The legitimacy of the claimant and his ancestors was to be presumed. The burden of proof, when bastardy was affirmed, lay upon the allegor. 2nd. When any degree of propinquity was proved, that was presumed to be the nearest, until a nearer was proved. In the proof of a pedigree, therefore, if the line of the claimant was fully established, it was not necessary that he should establish the extinction of all nearer heirs without issue or descendants. Mr. Erskine says that the proof of the propinquity resolves itself into this negative, that there is no nearer degree, which proves itself.(a)

This rule was always followed in practice, and many cases of contested pedigree have been decided, where the party never could have succeeded, if it had been incumbent upon him to \*extinguish all nearer heirs, or prove the fact that none nearer [ \*599 ] existed.(b)

It seems doubtful whether the practice of recording the retours of services always prevailed, or whether it is of comparatively modern date. The question is unimportant; if the oldest retours were recorded, the records have been lost, and no trace of them remains. Those which now exist are kept among the Chancery Records in the Register Office in Edinburgh.

The earliest records of retours now existing are of about the date of 1630. They contain a miscellaneous collection of retours, of which the oldest is dated in 1547, but of which the number prior to 1600 is very inconsiderable. From the year 1600 to 1630, the collection becomes gradually more ample, and approaches somewhat to a regular chronological order. From the year 1630, downwards to the

(y) Sandford on Heritable Succession in Scotland, vol. 1, p. 273.

(z) Erskine's Inst., book iii., tit. 8, s. 66, Earl of Cassilis v. Earl of Wigton, 22nd July, 1639. Dictionary of Decisions of the Court of Session, p. 14423.

(a) Ersk. Inst., book iii. tit. 8, s. 66.

(b) Sandford, p. 277, How v. Bryden, 9th March, 1822.



present day, the record may be considered as nearly perfect; one volume relative to the years 1610-1614 is missing. There is reason to suppose that the collection of "*special services*," is more complete than that of "*general services*," many of which have probably never been retoured to Chancery, and consequently never entered in the record.(c) The Record Commissioners have caused an abridgment of the records of retours to be published, under the title of "*Inquisitionum ad Capellam Domini Regis Retornatarum, quæ in Publicis Archivis Scotiæ adhuc servantur Abbreviatio.*"—The Abridgment of the Register of Retours to Services in Scotland." In this abridgment the retours of special and of general services have been separated from one another.

In those of special services, a local arrangement is adopted, according to the several counties in which the lands are situated, and they are placed according to the order of time.

[ \*600 ] \*The abridgment of each retour gives the date of the service; the names of the heir and the ancestor; their natural relation to each other; the specific description of heirs to which the former belongs, i. e., whether simple heir, or heir male, heir of provision, heir portioner, &c., an exact enumeration of the lands and annual rents to which the claimant has been sworn heir; and a statement of the valuation of the whole, or of its different portions, according to the old and new extent. There is subjoined a reference to the volume and folio of the record, and when the retour is of a complete kind, there is added a reference to the other counties, under which, in their chronological place, the other portions of the retour are to be found. In connection with this part of the work there are given alphabetical indexes both of persons and places.

In the arrangement of the retours of general services, the order of time has been observed; and in framing the abridgment of each, nothing more has been deemed necessary, than to specify the names of the heir and the ancestor; their natural relation to each other; and the particular description of heirs to which the former belongs. A reference to the original record, and an alphabetical index of persons is subjoined.

These records were instituted in 1630, without any public authority, by Sir John Scott, of Scotstarvet, who then held the office of Director of Chancery. Notwithstanding this, they are constantly admitted as evidence in Courts of Law.(d)

Retours of "*special*" and "*general services*" do not stand upon precisely the same ground in respect of their admissibility as evidence. The former, as we have seen, were always taken with reference to some subject of feudal investiture; the latter might be, and often were taken, without reference to any subject; it may, therefore, well be supposed that the proofs of propinquity would be less rigidly examined.

(c) For a more full and particular account of the services general and special, the reader is referred to the Preface to the Abridgment of the Register of Retours of Services in Scotland, published by the Commissioners of Records, and the Appendix to the First Report of the Commissioners of Records, from which the brief notice of the Retours given above, has been chiefly compiled. See also the same subject treated at length in Sandford on Heritable Succession in Scotland. Vol. i., p. 265, et seq.

(d) App. to Rep. Pub. Rec., 1812, p. 153.

The nature of the evidence to be extracted from general retours, has been stated in the following terms:—

\*A general retour can only be brought to prove two [ \*601 ] facts. 1. That the ancestor died. 2. That the claimant served by that retour, was in the propinquity therein set forth. Now, in ordinary cases, both these propositions are received on user, habit and repute. Seldom is a witness brought who saw the death of the ancestor, or who saw the birth of the claimant. A general service is not therefore *per se* sufficient proof of the propinquity, when that propinquity must be proved for another purpose. The retour, like any other verdict, is that formal instrument which the law requires to prove certain facts for a certain purpose, and to the extent of that purpose it is in law believed. Beyond that purpose it is nothing but an adminicle.(e)

The production of retours of service is of frequent occurrence in claims to Scotch Peerages.

In the Annandale Peerage case, in 1825, in order to show that the claimant was the eldest son of Lady Ann Hope Johnstone, a retour of general service in 1823 was offered in evidence.(f) The Attorney-general submitted, whether this, being of so late a date, could be considered as evidence. Counsel submitted that it was, at all events, *primâ facie* evidence. The House considered it as evidence, giving to it such weight as they considered it entitled to.

It has been stated,(g) that the Lord Chancellor Eldon said, "it might be received as *primâ facie* evidence, but that better ought to be given. Old retours or inquisitions *post mortem* could not generally be substantiated, but modern facts required better proof." And it is said that the printed minutes of this Peerage take no notice of Lord Eldon's observations, and from the statement that the evidence was received, convey an erroneous impression as to the admissibility of such evidence on disputed cases.

\*The procedure by brieve of succession was resorted to [ \*602 ] to when the property was held of the Crown. If the lands are held of a subject superior, the heir, in place of being served by an inquest, may obtain a precept of seisin from the superior, called "*Clare constat*," from the first words of its narrative, in which the superior acknowledges that the obtainer of the precept is next lawful heir to him who died last seised, in the particular lands therein specified, holden of himself, the grantor, and, therefore, commands his bailiff to infest him in them. The heir thereby acquires an active title as to the subject contained in the precept in question, with the superior who has thus acknowledged his right, or with his heirs.

A precept of *clare constat*, and instruments of sazine proceeding thereon, were admitted as evidence of heirship, on a claim to vote at the election of Peers for Scotland.(h)

There were two other classes of Scotch inquisitions retoured to Chancery, and there recorded, of inferior importance to those which

(e) *Cochrane v. Ramsay*, 11th March, 1828, per Lord Balgony. Sandford, 1, 300.

(f) Min. Ev. p. 28. In a recent case, it was observed by the Lords that little attention is paid to these documents on account of their having been *ex parte* proceedings. Airth Earlom, Min. Ev. p. 91.

(g) Grim. Orig. Gen., pp. 145, 146.

(h) Election of Peers for Scotland, Min. Ev. 1791, p. 141.

have been considered. One class of these originates in what is called the "*Brieve of Tutory*," and has for its object to ascertain who is the person that by law ought to be appointed to the office of tutor to a minor under the age of puberty, as being the nearest agnate, or paternal relative, of the age of twenty-five years. Another class originates in what is called "*Brieve of Idiotry*," or "*of Furiosity*," the purpose of which is to ascertain, in the first place, the mental incapacity of the individual alluded to, for the management of his own affairs; and, in the second place, who is the nearest agnate of proper age and capacity, on whom that management is to be devolved. In the Abridgment, the retours of both these classes have, from their analogy, been arranged together in the order of time, under the general title of *Inquisitiones de Tutela*.<sup>(i)</sup> These may occasionally be found to afford some genealogical evidence or information.

Some other inquisitions proceeding from royal authority should be noticed as supplying occasional evidences of pedigree. [ \*603 ] Some of these, especially those called "*the Hundred Rolls*," partake so far of the nature of inquisitions *post mortem*, as they embrace many of the same subjects of inquiry.

The rolls officially denominated "*the Hundred Rolls*," contain inquisitions taken in pursuance of a special commission issued under the Great Seal, dated 11th day of October, 2nd Edw. 1. This commission was issued in order to correct abuses which had crept in during the reign of Hen. 3, by which the revenues of the Crown had been diminished, at the same time that the subject had in many cases suffered from illegal exactions.

It was a function of the Justices in Eyre to inquire, as well of all rights of the Crown, in order to preserve so material a part of the royal revenue as arose from the incidents to feudal tenures, as of oppressions of the King's officers. For this purpose the justices delivered in charge to the hundredors certain articles called "*Capitula Itineris*." When Edw. 1 issued the special commission above mentioned, some additional articles of inquiry beyond those usually pointed out were given in charge to the jurors; which additional articles, after the 6 Edw. 1, were embodied in, and formed a part of the heads of inquiry, or "*capitula*" always given in charge by the Justices in Eyre. They were entitled "*nova capitula*," as distinguished from the old articles.<sup>(j)</sup>

Amongst the subjects of inquiry in these inquisitions, were the persons holding manors formerly belonging to the Crown, tenants *in capite* and ancient demesne, subinfeudations by tenants *in capite*, alienations to the Church, wardships, marriages, escheats, suits and services withholden and subtracted. It is evident, from the nature of these inquiries, that much genealogical information must be contained in the returns to them.

[ \*604 ] The original inquisitions for the county of Lincoln are among the records in the Tower: those for several other

(i) Preface to the Abridgment.

(j) Vide Fleta, Lib. 1, c. 20, tit. "De capitulis Corone et Itineris." For a more particular account of the causes and object of the Commission of 2 Edw. 2, and the contents of these "*capitula*," the reader is referred to the preface to the 1st vol. of the *Hundred Rolls*, published by the Commissioners of Public Records.

counties are among the records of the Court of the Receipt of the Exchequer, recently removed from the Chapter House at Westminster to the Carlton Ride. These rolls have been printed, in two volumes, by the authority of the Record Commissioners; and, as no original rolls have been yet discovered for a few counties, extracts of the inquisitions for all the counties, which are entered on these rolls in a handwriting coeval with the inquisitions, and also preserved in the Chapter House, have been printed to supply the deficiency. (k) The second volume of the Hundred Rolls contains some inquisitions of a later date, but of the same nature, taken under a special commission of the 7 Ed. 1, by way of a general survey of the kingdom; of which, however, only those for the counties of Bedford, Buckingham, Cambridge, Huntingdon and Oxford, are known to exist. (l)

A volume has also been printed, containing "*placita de quo warranto*." These are proceedings taken on behalf of the Crown against those persons who, in the inquisitions taken by the Justices in Eyre, were found to be claimants of lands or liberties against the Crown, without sufficient title. The rolls from which these pleadings of the reigns of Edw. 1, Edw. 2, and Edw. 3, have been printed, are in good preservation, (m) and are amongst the records recently transferred to the Carlton Ride from the Court of the Receipt of the Exchequer, and the Chapter House.

Inquisitions "*ad quod damnum*," were taken by virtue of writs directed to the escheator of each county. When any grant of a market, fair, or other privilege, or license of alienation of lands was solicited, the escheator was commanded by a writ of this denomination, to inquire by a jury whether such grant or alienation was prejudicial to the king or to others, in case the same should be made. They commence in the 1st of Edw. 2, 1307, and end with 38 Hen. 6, 1400. (n) Their place of deposit is the Tower.

\*A sufficiently copious calendar of these inquisitions [ \*605 ] has been printed, under the direction of the Record Commissioners, to which is subjoined an index *locorum et nominum*. (o) Of this work it has been remarked, that though the result of the inquisitions is not to be gathered from this Calendar, for which the original records must be consulted, it is nevertheless of much utility; for it generally proves that the parties mentioned were seised of the lands alluded to, and occasionally presents genealogical facts, and curious antiquarian and historical information. (p)

Forming part of the volume which contains the calendar of inquisitions *ad quod damnum*, and therefore proper to be mentioned here, is the calendar of the *Charter Rolls*, the originals of which are in the Tower. (q) These records contain royal grants of privileges to cities,

(k) The Rolls are not complete for any of the counties. 1st Rep. on Pub. Rec. App. p. 54. (l) See Preface to vol. 2, Hundred Rolls.

(m) Preface to *Placita de quo warr.*, and see Cooper on Pub. Rec., i. p. 277.

(n) Preface to Calendar of Inq. *ad quod damnum*.

(o) Cooper on Pub. Rec. i., p. 225. Since the publication of this Calendar, seventy-two additional inquisitions have been discovered, of which a calendar has been interpolated, in an interleaved copy of the above Calendar. 4th Rep. of Dep. Keep. of Pub. Rec., p. 26.

(p) Nicholas on Pub. Rec., p. 44.

(q) There are other Charter Rolls at the Rolls Chapel, which will be noticed in a future page.

towns, bodies corporate, and private trading companies, grants of markets, fairs, and free warrens; grants of creation of nobility, from the 11 Ed. 2, to the end of the reign of Ed. 4; grants of privileges to religious houses, &c. The calendar which was printed by the Record Commissioners from a MS. apparently of the time of Jac. 1, has an index *locorum et nominum*; (r) and with some few inaccuracies is said to be, upon the whole, a valuable book of reference to the contents of the records: (s) and to afford much information with respect to lands and individuals. (t)

Domesday Book may be mentioned here as the oldest inquisition amongst the records of the country. It contains a survey of all the counties in England, except the four northern, with a statement of all the ancient demesne lands of the Crown. It also contains some pedigrees. It is kept in the Chapter House at Westminster.

Inquisitions of lunacy will sometimes be available as evidence of pedigree. On the trial of an issue out of Chancery the [ \*606 ] proceedings on a commission *de lunatico inquirendo* were put in evidence. In the return to the inquisition the jury found E. R. Cotton the next heir of the lunatic, and that he was of the age of thirty years. (u) This was read to prove the legitimacy of E. R. Cotton. It was proved that it was formerly the practice, when an inquisition was executed in the country, to find heirship, but not when it was executed in town. In both cases it is customary to refer to the Master to inquire who is the next heir.

In the House of Lords on the claim of James Netterville, Esq., to the Viscounty of Netterville, (v) the appointment of a guardian to a lunatic, reciting the commission and inquisition, whereby it was found that his brother was his next heir, were put in evidence: examined copies of the inquisition from the office of Registry of Chancery in Ireland were put in, but the inquisition itself does not appear to have been called for. These were formerly, together with other inquisitions returned into Chancery, deposited at the Rolls, or in the Tower; but they are now kept in annual bundles in the Petty Bag Office. (w)

[ \*607 ]

## \*CHAPTER VIII.

## ANCIENT PUBLIC RECORDS.

RECORDS are "the memorials of the Legislature, and of the King's Courts of Justice," and are said by Gilbert, C. B., to be "authentic beyond all manner of contradiction." (a) By this it must not be understood that records are conclusive evidence of everything that may be found in them. This seems clear from the case of *Pride v. Earl of Bath*, in which evidence was admitted to bastardize a man after his death, and that of his father and mother, by showing that their mar-

(r) Preface to the Calendar of Charter Rolls.

(s) Cooper on Pub. Rec. i., p. 295.

(t) Nicolas on Pub. Rec., p. 41.

(u) Beer v. Ward, 1st issue, p. 53; 2nd issue, p. 71.

(v) Min. Ev., p. 57.

(w) 2nd Rep. of Dep. Keep. of Pub. Rec., p. 45.

(a) Gilb. on Ev. p. 7.

riage was void, against a patent of Peerage, and an Act of Parliament, in which he was styled son and heir.(b) With respect, however, to the principal fact of which the record is a memorial, as the passing of an Act of Parliament, or the tenor of a judgment or decree, "no averment, plea, or proof to the contrary"(c) can be admitted. Except on claims of peerage, examined copies of records have always been treated as primary evidence, apparently on the principle stated to be applied to parish registers, namely, the public inconvenience which would be caused by the removal of public documents from their proper depositories.(d)

In claims of peerage, however, a stricter rule has prevailed, and it is the uniform practice of the House of Lords to require the production of the original record, in the hands of some officer of the establishment where it is deposited, if within the kingdom. Thus on one occasion, an examined copy of an inquisition *post mortem*, taken in the Palatinate of Durham was rejected, and the \*original [ \*608 ] was required. In another case permission was given to counsel to read from an examined copy, on account of the damaged state of the Roll itself, which would have made a considerable time necessary to make it out; but there the Roll was produced, and the permission to read from the copy was only given, after particular inquiry as to the examination of it, by the witness who produced the Roll, and his knowledge of its accuracy.(e) The rule has not been extended to records out of the kingdom, examined copies of which are received, the witness who produces them having been first sworn to his examination of them, and their accuracy.(f)

The recent act for the regulation of the public records, after enacting that a public record office shall be established under the direction of the Master of the Rolls, who is to have the custody of all the public records, amongst other enactment, directs that a seal of the office shall be made; that copies of any records in the custody of the Master of the Rolls may be made by his permission, which being examined and certified by the deputy or assistant keeper of the records, shall be sealed with the seal of the office; and that all such copies shall be received as evidence in all Courts of Justice, and before all legal tribunals, and before either House of Parliament, or any committee of either House, without any further or other proof thereof, in every case in which the original record could have been received there as evidence.(g)

In the recent case of the claim of Sir B. W. Bridges to the Barony of Fitzwalter, a copy of a commission to take a visitation, under the seal of the Record-keeper in pursuance of this act, was put in evidence without objection;(h) and it would seem, therefore, that the House of Lords will receive documents certified and sealed in accordance with the act, even in claims of Peerage.(i)

(b) 3 Levinz, 410.

(c) Co. Litt. 260 a.

(d) See Dougl. 594, n.; 1 B. & A. 185.

(e) Marmyon Barony, Min. Ev. 25.

(f) See Athenry Barony, Min. Ev. 8; copy of Proceedings in Chancery in Ireland, admitted in the same case, Min. Ev. pp. 32, 34; Copy of Decree in Scotch Court, Roxburgh Dukedom, Min. Ev. 116.

(g) 1 & 2 Vict. c. 94, ss. 10, 12, 13.

(h) Min. Ev. 1842, p. 94.

(i) That the House of Lords is not bound by the ordinary rules of evidence, see sup., p. 96.

[ \*609 ] In treating of the public records of the kingdom as sources of \*genealogical evidence, it will be desirable in some degree to observe the classification of them which has been made by other writers; by whom they have been traced as concerning the proceedings of the Houses of Parliament, the Revenue, the Courts of Common Law, and the Court of Chancery.(j) The promiscuous nature of the contents of some of the earlier records makes it difficult, if not impossible, to distinguish them all according to this classification; but exact accuracy is not necessary.

The Parliamentary Records, or, as they may be generally denominated, Rolls of Parliament, form by far the most important branch of the public records of the kingdom, from their antiquity, and the multiplicity of subjects, which in the earlier periods of our history came before the parliament. They are of course of a very miscellaneous nature, comprising statutes in various forms, parliamentary petitions, writs and proceedings thereon, writs of election and summons, charters, and various other matters not easily susceptible of distinct classification. Some of them, as the Charter, Patent, Close and other Rolls, form distinct sets, and will be treated separately; and of the rest some sort of classification will be attempted; in which arrangement, the different publications, which have from time to time been put forth, in the forms of calendars, indexes, abstracts, &c., of different classes of these records, will assist.

No record which can properly be called a Roll of Parliament, anterior to the eighteenth year of Edw. 1, has been discovered. Rolls of pleadings *coram rege et concilio* of an earlier date have been found, but there are no consecutive records of the legislature until the above mentioned era;(k) and even from that time the series of records is very imperfect. Thus of Edw. 1, only the Rolls of the 18, 19, 20, 21, 22, 23, 26, 28, 29, 30, 33, and 35, are preserved. Of Edw. 2, only the 8, 9, and 14. Of Edw. 3, only the 1, 4, 5, 6, 13, 14, 15, 18, 21, [ \*610 ] 22, 25, 29, 36, \*37, 38, 40, 42, 43, 45, 46, 47, 50, and 51; and there are many chasms in subsequent reigns.(l)

The parliamentary petitions, writs, and other proceedings thereon, contained in the Records of Parliament, are of two classes: public petitions, upon which the public statutes were grounded; and private petitions, presented by individuals, or communities, in relation to their own affairs.(m) The former, though of great value to the historian, do not afford much assistance to the genealogist, and do not require a very detailed description here.

It may be sufficient to notice the several forms in which they exist. Of these there seem to be four classes, all of authority as records. The Statute Rolls which contain the statutes to the 8 Edw. 6. Inrolments of Acts of Parliament, containing the acts certified, and delivered into chancery, from 1 Ric. 3, to the present time. Exemplifications, Transcripts, Writs; and Original Acts from the 12 Hen. 7,

(j) Butler's Co. Lit. 260 a, n. (1).

(k) Up to that time, the proceedings of the legislature were exceedingly irregular, and greatly defective in point of form; afterwards they acquired greater regularity, though far removed from that in which they appear at present. Ibid.

(l) Cooper on Public Records, vol. 2, pl. 11.

(m) Ibid. vol. 1, p. 325.

to the present time, which, with some interruptions, are in the Parliament Office.(n)

The second class of Parliamentary writs and proceedings above mentioned, namely, those founded on the petitions of private persons or communities, abound with curious and valuable facts, illustrative of matters of descent, tenure, and genealogy. The writs of summons and election will be treated separately; the other writs, commissions, and documents relating to Parliament, may be briefly noticed under the following heads:—Commissions for the conservation of the peace, or for the punishment of breaches of the peace; commissions of inquiry relative to usurpations, wrongs, and oppressions, not cognizable in the ordinary course of law; the grants of franchises, or remedies of public nuisances; grants of tolls and dues to bodies corporate, or individuals; grants of lands and dignities made by the king with consent of parliament; remedial and other commissions; [ \*611 ] writs issued by virtue of particular statutes, as those relating to the perambulations of forests, purveyance, &c.(o) This summary, short and imperfect as it is, will serve to give some notion of the nature of the information derivable from these records.

Six folio volumes of the Rolls of Parliament were published in the year 1767, under the auspices of the House of Lords. They were said to contain all the existing records of the parliamentary proceedings,(p) and had the character of being executed with the greatest accuracy.(q) Numerous ancient parliamentary petitions, &c., have, however, been discovered since the publication of that work, and it is stated to be otherwise imperfect.(r) Yet it is certainly a valuable publication, comprising a period of our history from 1278 to 1503, and contains a large number of petitions, pleas, and other documents upon the miscellaneous subjects, which at that period came before the House of Parliament.(s)

The writs of summons to peers, writs for the election of members of the Commons' House of Parliament, writs for levying the expenses of knights and burgesses, writs of military summons, and other parliamentary writs, form a large and important branch of the Records of Parliament. A collection of these valuable writs is in process of publication, under the authority of the Record Commissioners. It includes all the records which show the constituent parts of the ancient legislative, and remedial assemblies of England, beginning with the reign of Edward 1, when they first assumed a definite organization. A statement of the documents from which it has been compiled, will serve to show the nature of its contents. They have been arranged under the following heads:(t)—Writs of summons addressed to the prelates, the

(n) For a full description of the nature and contents of these statute rolls, &c., see the Introduction to the Authentic Collection of Statutes published by the authority of the Record Commissioners, p. xxxiv. This collection contains numerous charters, instruments, and matters of a parliamentary form and character, besides the statutes themselves.

(o) Cooper on Public Records, vol. 1, p. 320, where see a more detailed classification of these parliamentary proceedings.

(p) Preface to Index to Rolls of Parliament, 1832.

(q) Butler's Co. Litt. 260 a, note (1).

(r) Edinburgh Review, vol. lxxi. p. 474; Introduction to Authentic Collection of Stat. p. xxvii.

(s) Preface to Index to Rolls of Parliament, 1832.

(t) Preface to 1st vol. of Parliamentary Writs, published 1827, where see a more full account of the writs, &c.



[ \*612 ] earls, and to the individuals designated as *Barones, Proceres*, or *\*Magnates*, and also to the justices, clerks, and others of the council. Proxies of the prelates, earls, and proceres. Precepts, and mandates requiring the attendance of the inferior clergy. Writs for the election of members of the Commons' House of Parliament, and returns. Writs for levying the expenses of knights, citizens, and burgesses. Writs of military summons specially addressed to the greater or lesser barons of the realm. Writs for the performance of military service, addressed to the sheriff of the county. Commissions of array, and other instruments relating to the military service. Records affording evidence of the names of the individuals who actually attended, or deliberated, in parliaments or councils. Records affording evidence of the actual performance of military service. The work is accompanied by a chronological abstract of the documents, with historical notes, a calendar of the writs of election and returns, and an alphabetical digest of the facts relating to persons. Two volumes of this work (the second in three parts) have been given to the public. The first comprehends the reign of Edward 1, the second that of Edward 2.(u)

The Rolls of Parliament, from the 18 to 35 Edw. 1, and one of petitions in parliament, of 7 Hen. 5, are in the Chapter-House at Westminster. A book of inrolment, called *Vetus Codex*, in which are entered proceedings in parliament from 18 to 35 Edw. 1, and in 14 Edw. 2, is in the Tower.(v) There also are rolls containing pleas, and other proceedings in parliament, between 5 Edw. 2, and 13 Edw. 3, and rolls of parliament of 9 Edw. 2; 4, 5, 6, and 13 Edw. 3, and from thence to the end of the reign of Edw. 4; those which follow, down to the present time, are in the Chapel of the Rolls. So late as the reign of Car. 1, miscellaneous matters and proceedings of parliament were enrolled together with the acts, public and private; but in the early part of that reign, this practice was discontinued, and from [ \*613 ] that time the inrolments of Acts of Parliament contain nothing \*but the public acts, and the titles of private acts, the latter head moreover having been omitted since the 32 Geo. 2.(w)

The certified transcripts into Chancery of Acts of Parliament, are received in evidence of the contents of the acts, even by the House of Lords in Peerage claims. Thus, in the Roos case, the original certified transcript into Chancery of an act passed, 22 Car. 2, for the illegitimation of the children of the Lady Ann Roos, wife of John Lord Roos, was read in evidence.(x)

The Parliament Rolls for the periods before the commencement of the Journals, are the proper evidence of the sitting of peers in parliament, and of all other facts which would follow as consequences of such sitting. It is to claims of peerage that we must look, for illustra-

(u) Preface to the 2nd volume of Parliamentary Writs, published 1834. The calendars of writs of Edw. 3, and Ric. 2, are completed; Report of Proceedings of Editor of Rolls of Parliament for 1830, 1831. See Coopes on Public Records, vol. 2, p. 77.

(v) This book is an authentic record. See Cooper on Public Records, vol. 1, p. 176, n.

(w) Introduction to authentic collection of Statutes, xxxv. Copies of Petitions in Parliament, and Answers thereto, of various years of Edw. 1, Edw. 2, and Edw. 3, are among Lord Hale's MSS. in the Library of Lincoln's Inn. Ibid. p. xxxvii. And see Cooper on Public Records, vol. 1. pp. 164. 169. 176.

(x) Roos Barony, Min. Ev. 145.

tions of the use of these early records, as genealogical evidence. Thus, in the claim of Sir W. Jerningham to the Barony of Stafford, the Parliament Roll of 25 Edw. 3, produced from the Tower, was put in, to prove that Ralph Baron of Stafford, sat in parliament, as a baron, and was appointed one of the triers of petitions in England.(y) In the same case, to prove that Henry, Duke of Buckingham was attainted of high treason, the Parliament Roll of the 1 Ric. 3 was produced from the Rolls' Chapel.(z) And, again, in the same case, to prove the restitution in blood of Edward Stafford, knight, son and heir of the said Henry, Duke of Buckingham, the Parliament Roll of 1 Hen. 7 was produced from the same custody.(a)

The miscellaneous information contained in the early rolls of parliament, which begin to be less copious about the time of Hen. 8, is in later times supplied by the journals of the two houses. The journals of the House of Lords commence with the 1 Hen. 8, but the originals of some years of that reign, and \*the first and second [ \*614 ] sessions of 1 Mary are wanting.(b) They have at all times been considered as records,(c) and copies of them have consequently been admitted in evidence.

The nature of the facts to prove which the journals have been admitted by the house itself in claims of peerage, has been noticed in a former page.(d) Some further instances may be adduced here. In the claim of Mr. Trefusis to the barony of Clinton, in 1794, to prove that Edward Earl of Lincoln died in 1692, without issue male, the journals were referred to; by which it appeared, that an order was made, that the Earl of Lincoln do not take the oaths, until the report of a committee, to whom the patent, and his pedigree had been referred, should be received. This committee, having been attended by the heralds, delivered in a pedigree signed by the heralds, which they were of opinion was clear, and from which the fact of failure of issue appeared. In the same case, recourse was had to the journals, to shew certain proceedings of the house, in investigating the precedence of an ancestor of the claimant, from which an inference was drawn, as to the creation of the barony by writ, and not by patent; and this inference appears to have been considered sufficient, no direct evidence to that effect having been adduced, and the claim being allowed.(e)

So in the claim of Sir J. S. Sydney to the barony of L'Isle, entries in the Journals of the House of Lords were produced, to prove that Robert Sydney, first earl of Leicester of that name, left Philip Sydney, second earl of Leicester, his eldest son and heir, who left descendants, who successively enjoyed the title.(f)

The Journals of the House of Commons commence in 1 Edw. 6; but until the beginning of the reign of Elizabeth, they contain merely short notes of the several readings of the respective bills before the

(y) Stafford Barony, 1808, Min. Ev. p. 39.

(z) Ibid. p. 41.

(a) Ibid. p. 53. And see Camoys Barony, Min. Ev. p. 20 et seq.

(b) Introd. to Coll. of Stat. App. F. p. lxx.

(c) Per Lord Mansfield, Jones v. Randall, Cowp. 17.

(d) Supra, p. 100.

(e) Clinton Barony, Serjt. Hill's Collection, vol. 30, p. 331.

(f) L'Isle case, by Sir H. Nicolas, p. 46. See also Fitzwaller Barony, Min. Ev. p. 6.

house, with a few occasional entries only of other proceedings.(g) They [ \*615 ] have not always \*stood on the same ground with those of the House of Lords; and doubts were formerly entertained whether they were admissible, the House of Commons not being a court of record.(h) Copies of the journals were, however, admitted without dispute, in the case of *Rex v. Lord George Gordon*.(i) The House of Lords has also admitted such copies;(j) it may now, therefore, be considered as settled, that the Journals of the Commons bear the character of records, at least, to the extent of making copies of them admissible as primary evidence.

Amongst the records of the House of Lords of Ireland, preserved in the Parliamentary Record Office, Dublin Castle, are several petitions, reports, and other papers connected with claims to peerages made previous to the Act of Union. The dignities to which those documents chiefly relate, and the period at which such claims were made, are as follows :(k)—

Papers relating to				
The Barony of Slane, dated about the year	-	-	-	1709
Earldom of Tyrone	-	-	-	1717
Barony of Kingsale	-	-	-	1721
Barony of Upper Ossory	-	-	-	1749
Barony of Le Poer	-	-	-	1767
Viscounty of Valentia, &c.	-	-	-	1771-2
Viscounty of Boyne, &c.	-	-	-	1772
Barony of Castlestewart	-	-	-	1774
Barony of Dunsany	-	-	-	1782
Viscounty of Castelletogallen	-	-	-	1788
Earldom of Ormond and Ossory	}	-	-	1791
Viscounty of Thurles				
Baronies of Butler and Arcklow	}	-	-	1792
Earldom of Roscommon, &c.				
Barony of Trimblestown	-	-	-	1795
Earldom of Fingall	-	-	-	1795
Barony of Louth	-	-	-	1798
Viscounty of Gormanstown	-	-	-	1800

[ \*616 ] \*After the Act of Union, some other claims to dignities were also preferred. Of these, one of the most interesting, on account of its being principally grounded on continental records, is the claim to the viscounty of Galmoye.

The series of the Charter Rolls commences in the year 1199,(l) and terminates in 1516, when that species of royal diploma called charters ceases; and all the written acts of the sovereign in the nature of grants, were thenceforward made in the form of letters-patent, and recorded upon the Patent Rolls.(m) They have been described as containing

(g) Cooper on Public Records, vol. i. 177.

(h) Per Lord Mansfield, *Jones v. Randall*, Cowp. 17.

(i) Dougl. 572.

(j) Wynne v. Middleton, Ibid. note.

(k) View of the Legal Institutions, Honorary Hereditary Offices, and Feudal Baronies established in Ireland during the reign of Hen. 2, 1830, p. 277.

(l) A membrane containing some charters of 1 Joh. was lately discovered in the Office of the King's Remembrancer of the Exchequer. They are printed at the beginning of the 1st vol. of *Rotuli Chartarum*. Introduction to that work, p. xxxix.

(m) For a particular description of the difference between charters, letters-patents, and

royal grants of privileges to cities, towns, bodies corporate, and private trading companies, grants of markets, fairs, and free warrens, of creations of nobility, of privileges to religious houses, &c.(n)

The Charter Rolls from the 1 Joh. to the end of the reign of Edw. 4, are in the Tower of London; the subsequent rolls are in the Rolls' Chapel. A calendar of the Charter Rolls in the Tower was printed under the Record Commission, from three volumes preserved in the Record Office, apparently of the time of Jac. 1. An index *locorum et nominum* is subjoined.(o) A volume forming the first part of a regular series of the Charter Rolls was published under the authority of the Record Commissioners in 1837. It contains the charters down to the 18 Joh. and has a copious index of places and persons.(p)

The Patent Rolls contain grants of offices and lands; restitutions of temporalities to bishops, abbots, and other ecclesiastical [ \*617 ] \*persons; confirmations of grants made to bodies corporate, as well ecclesiastical, as civil; grants in fee farm; special services; grants of offices, special and general; patents of creations of peers, and licenses of all kinds which pass the great seal; and on the back of these rolls are commissions to justices of the peace, of sewers, and all commissions, indeed, which pass the great seal.(q)

These records commence in the 3 Joh. and are continued to a recent period. The earlier rolls down to the 23 Edw. 4 are deposited in the Tower. Those which follow, commencing with a small roll of Edw. 5, are in the Rolls' Chapel.

The calendar to such of these Rolls as are in the Tower, was printed from four MS. volumes, procured in 1775 by Mr. Astle for public use, from the executors of H. Rooke, Esq., and collated with two MSS. in the Cottonian Library in the British Museum, marked Titus C. II. and III. Indexes "*rerum*," "*locorum*," and "*nominum*," are subjoined. The work itself, though yielding much important information, is only a selection, and, in fact, a comparatively small selection, from the whole number of entries contained in the Patent Rolls; of the contents of which a general and perfect calendar, has for some years past been in progress at the Tower.(r)

One volume of the Patent Rolls was published in 1835 by the Record Commissioners. It contains the rolls from their commencement to the 18 Joh. An index *nominum*, and index *locorum* is appended.

There is no scarcity of instances amongst the numerous claims of

letters close, see Nicolas on Public Records, p. 40, and the Introduction to the vols. of Rot. Chart., Rot. Patent and Rot. Claus.

(n) Preface to Calendar of Charter Rolls and Inquisitions *ad quod damnum*.

(o) Although the exact purport of the different charters cannot always be gleaned from the printed Calendar, it nevertheless affords much information with respect to lands and individuals. See Nicolas on Public Records, p. 41.

(p) It is intended to publish the whole of the Charter, Patent, and Close Rolls now extant, in a regular series, uniformly with the Parliamentary Writs, &c.; some of the volumes have been published. See inf. p. 617. 621.

(q) Preface to Calendar of Patent Rolls; and see a rather fuller description of the contents of these rolls, in the Appendix to the First Report of the Select Committee on Public Records, pp. 53. 84.

(r) It has been ascertained that on an average in the reigns of John and Hen. 3, not more than one in fourteen of the entries had been noticed in the printed Calendar. In the times of Edw. 1 and Edw. 2, the average is about one in twelve, and in the subsequent reigns about one in ten. See Cooper on Public Records, MS. Coll. vol. I. p. 299.

Peerage, of the utility of these records in affording evidence of descent. [ \*618 ] In the claim of Sir George Jerningham to the Barony \*of Stafford in 1812, to prove a part of the claimant's pedigree, the original Patent Roll of the 22 Ric. 2 was put in evidence, containing the King's license to Edmund Earl of Stafford, to marry Ann, the widow of his late brother Thomas.(s)

So the Patent Roll of 9 Jac. 1 was put in, to prove by a grant of livery made to Francis Lord Norreys, that he was the grandson of Henry Lord Norreys.(t)

It has been stated in a former page, that where the creation was by patent, the patent itself must be produced to prove the creation, unless its loss can be shewn.(u) In a recent case, where the enrolment of a patent of Peerage of 18 Car. 1 was produced to prove the creation; in reply to an inquiry, whether search had been made for the original patent, it was stated that the claimant had no means of searching in any direction; that it could not possibly be in any custody or possession to which he had access; that he had inherited no estate, and was not the personal representative, and therefore, had no muniments to refer to, and had not entitled himself to search for papers. The counsel were informed that the evidence might be received *de bene esse*.(v)

A document purporting to be a patent of Peerage from Jac. 2 to Thomas Nugent, was put in evidence in the claim of Wm. Thomas Nugent to the Barony of Nugent of Riverstown in 1839.(w)

In a patent of the 1 Jac. 1, produced in the Say and Sele case, no fewer than six descents of the pedigree were stated.(x)

[ \*619 ] Nevertheless, it seems that letters-patent are not conclusive \*proof of facts recited in them. This is clear from an old case at law, in which evidence was admitted to bastardize a son after the death of his father and mother, against a patent and Act of Parliament, in which he was called son and heir.(y) And the same view apparently is taken in the House of Lords. In the L'Isle case, letters-patent were produced against the claim, which recited the marriage of Lady Douglas Howard with the Earl of Leicester, and the consequent legitimacy of their son, Sir Robert Dudley, which, if true, would have imposed upon the claimant the necessity of proving failure of issue from him. From the circumstances, however, under which it was granted, 20 Car. 1, when the King was at Oxford, and as a compensation for the small price the Royal Family had paid for Kenilworth, no great weight seems to have been attached to this document.(z)

The close or "*claus*" rolls contain many important documents relative to the prerogatives of the Crown, and other matters of a very miscellaneous nature. That part of their contents more immediately connected with the subject of this Treatise, is contained principally

(s) Min. Ev. 1812, p. 21, and see claim of Sir W. Jerningham, Min. Ev. p. 58.

(t) Beaumont Barony, Min. Ev. 138. Other instances occur in the L'Isle Barony by Nicolas, pp. 34, 38; Courtenay claim, App. p. 35; Marryon Barony, Min. Ev. p. 42; Camoys Barony, Min. Ev. p. 51. Letters Patent, Courtenay claim, App. p. 40.

(u) Sup. pp. 155, 156, which see as to effect of stat. 3 & 4 Edw. 6, c. 4, and 13 Eliz. a. 6.

(v) Tracy Barony. Min. Ev. 12.

(w) Min. Ev. p. 4, where see considerable discussions, as to the respective forms of patents of peerage, and writs close.

(x) Min. Ev. p. 173.

(y) Pride v. Earl of Bath, 3 Lev. 410.

(z) Nicolas, L'Isle case, 418.

on the back of the Rolls, and consists of writs of summons to Parliament, and for the expenses of knights, citizens, and burgesses, proclamations, inrolments of deeds between party and party, liveries and seisins of lands, with a great variety of instruments too numerous to be recounted.(a) Since the reign of Hen. 8, they contain mostly the inrolment of deeds of bargain and sale, settlements and wills of Roman Catholics, conveyances of bankrupts' estates, recognizances, specifications of new inventions and other instruments, either acknowledged by the parties thereto, or sworn to by a subscribing witness for the purpose of inrolment, or inrolled for safe custody only, by warrant from the Lord Chancellor or Master of the Rolls, and also memorials of deeds, and other securities for annuities.(b)

Until the reign of Edward 2, the entries on the close roll of the writs of summons and of elections were extremely irregular. It appears to have been the practice (yet continued) for the Clerk of [ \*620 ] the Chancery to make out the writ from what is termed the Parliament Pawn, that is to say a pannel or schedule of parchment, containing the form of the mandate, and which it was his duty afterwards to enter upon the Close Roll. It is apparent, from the examination of the records, that such business was considered of secondary importance, when compared with the documents concerning property. Sometimes the clerks allowed the pannel to remain upon the file without transcribing it; or they would content themselves with tacking it as a *rider* to the Close Roll; whilst every writ relating to land was carefully recorded and enrolled, long before the clerks of the Chancery felt it a duty to make the Parliamentary enrolments with more regularity. In a constitutional point of view, this fact is of great importance, since every argument arising from the non-appearance of Parliamentary writs upon the Close Roll, must fall entirely to the ground; and though the Records do not furnish any writs of summons of the temporal peers, anterior to the Parliament convened by Simon de Montfort; still, as there is full evidence upon the Pipe Rolls, that they were issued as early as the reign of Richard Cœur de Lion, we can only attribute their absence on this roll to the carelessness of the official transcriber. This slovenliness is shown in many instances; it is not uncommon to find a baron summoned to Parliament many years after he had been consigned to the grave, to the great perplexity of the toiling genealogist, who vainly endeavours to reconcile the contradictions of the most authentic materials of the pedigree.(c)

Like the Patent Rolls some of the Close Rolls are deposited in the Tower, and some at the Rolls' Chapel. The former comprise those from their earliest existing date, 6 Joh. 1204, to the end of the reign of Edw. 4. The latter beginning with Edw. 5, are continued down to a recent period.

There is no calendar to these Rolls, and their value has, therefore, hitherto not been generally known. There is, however, in the possession of the Record Commissioners a MS. volume, containing short abstracts of "*Rotul. Claus.*" from the sixth to the ninth [ \*621 ] year of John, and abstracts of some few Rolls of the

(a) App. to 1st Rep. of Com. on Pub. Rec. pp. 53, 85.

(b) Ibid. p. 85.

(c) Cooper on Pub. Rec. (MS. Coll.) vol. i. p. 330.

twelfth and fourteenth years of that King, of which a few pages have been printed.(d)

One volume of the Close Rolls was published in 1833, by the Record Commissioners. It contains the Rolls from 1204 to 1224; an index *nominum*, and index *locorum* is added.

Their utility as evidence of pedigree is sufficiently demonstrated by the frequency with which resort has been had to them in cases of peerage claims, of which a few instances will be sufficient. Thus, in the claim of Lady Charlotte Fitzgerald to the Barony of Roos, in 1804, to prove a step in the pedigree, the original Clause Roll of 10 Edw. 2, was put in evidence, which contained the King's writ to the escheator, commanding him to deliver seisin to William de Ros, of the lands of William de Ros his father.(e) So in the claim of Sir William Jerningham to the Barony of Stafford, to prove that Edmund de Stafford had livery of the lands, of which his father Nicholas Baron de Stafford died seised 22 Edw. 1, the Clause Roll of that year was produced.(f) And similar evidence was given for the same purpose as to another member of the family. Again, in the same case we find the Clause Rolls of 11 Edw. 3, adduced, to prove that Ralph Baron of Stafford, was summoned to Parliament in the eleventh and several subsequent years of Edw. 3.(g)

The Patent and Close Rolls of Ireland begin about the end of the reign of Edw. 1. They contain the enrolments of matters of a similar nature to those which are the subjects of enrolment on the Patent [ \*622 ] Rolls of England, with some few additional matters of a nature peculiar to Ireland, such as grants of land under the acts of settlement and explanation, and under the commissions of grace of Car. 2, and Jac. 2, and grants from the commissioners of forfeited estates, &c.

The oldest Irish Close Roll is of the 20 Edw. 2. This class of Rolls appears not to have been continued in regular succession; there are indeed comparatively few of them now existing, not more than sixteen having been found, of various dates from the 20 Edw. 2, to the 13 Car. 1. It has in fact been observed, that any difference which might originally have existed between the Close and Patent Rolls in Ireland, was discontinued in course of time, although the name of the former was still preserved; for both species of Rolls contain matter of a similar kind, and in only one instance is there a Close and Patent Roll for the same year or period; which if they were meant to be distinct in their nature, could not but in some instances have been the case; and as far back as the books of reference to the Rolls extend, the Close Rolls are referred to, without any distinction from the Patent Roll.(h)

The Gascon, Norman, and French Rolls are records of the English

(d) Cooper on Pub. Rec., vol. i. p. 304.

(e) Min. Ev. p. 25.

(f) Min. Ev. p. 5.

(g) Min. Ev. p. 19. Other instances will be found, see Camoys Barony, Min. Ev. p. 6, several close Rolls from 7 Ric. 2, to 8 Hen. 5. 1b. 12 Hen. 7, and peerage claims pass. On the Close Roll of 6 Edw. 2, m. 22 d, there is a memorandum de nativitate Edwardi filii Edwardi 2 Regis Angliæ primogeniti. The memorandum is printed in the Fœdera, vol. 2, pt. 1, p. 187, and mentions the day of birth, and the baptism four days afterwards of Edw. 3, and also the names of his godfathers, of whom he had seven.

(h) Rep. from Com. on Pub. Rec. Ireland, vol. i. p. 78.

Chancery relating to the affairs of certain parts of France, whilst under the dominion of the kings of England.(i)

The Gascon Rolls begin in the twenty-sixth year of the reign of Hen. 3, and end with the 39 Hen. 6.

The Norman Rolls begin in the second year of the reign of King John, and end with the reign of Hen. 5. They contain not only the instruments relating to Normandy which passed the great seal, but also the "chirographs" of "concordes" which were effected before the Exchequer at Rouen.

The French Rolls begin with the sixteenth year of the reign of Hen. 3, and end with the reign of Edw. 4.

\*The Gascon, Norman, and French Rolls are in the [ \*623 ] Tower, and calendars to them were printed by Mr. Carte, with indexes of the names of persons and places in 1743, under the title of "Catalogue des Rolles Gascons, Normans, and François conservés dans les Archives de la Tour de Londres."(j)

The Roman Rolls begin in the 34 Edw. 1, and end with the reign of Edw. 4. They contain the transactions with the Romish see. No calendar has been made to them.(k) They are deposited in the Tower.

It has been observed that the rolls of France, Rome, and Almain may be considered as branches of the Close Rolls, being chiefly composed of diplomatic instruments relating to transactions with the potentates whose names are indicated by their titles, and which, on account of their extent and number, were more conveniently divided from the general series.(l)

The Scotch Rolls begin in the nineteenth of Edw. 1, and end in the twenty-second of Edw. 4. They relate to the transactions between England and Scotland during the above period.(m) Their place of deposit is the Tower; but there are Scotch treaties, letters, &c. in the Chapter House, extending from the reign of Richard 1 to that of Elizabeth, which are said to be of importance.

The Welch Rolls begin in 4 Edw. 1, and end with the 23 of the same King. They are in the Tower. Calendars of the Scotch and Welch Rolls were printed in 1772.(n)

The Coronation Rolls contain the commissions, and proceedings of \*the commissioners appointed to hear and determine [ \*624 ] claims of services to be performed at coronations. The Rolls of Edw. 2, Ric. 2, Hen. 4, and Hen. 5, are in the Tower: those from Jac. 1, to Geo. 2, with the exception of Car. 1, are in the Rolls' Chapel. The Roll of Geo. 3 was not made up in the year 1818.(o)

There are no Indexes to the Coronation Rolls, but as the whole

(i) App. to 1st Rep. of Com. on Pub. Rec. p. 53.

(j) This calendar was printed for the use of the inhabitants of the Duchy of Aquitaine, whose franchises Cardinal Fleury attacked, by an arrêt in the nature of a *quo warranto*. Cooper on Pub. Rec. 1, p. 304. Quarterly Review, vol. xxxix. p. 53.

(k) 1st Rep. of Com. on Pub. Rec. App. p. 53.

(l) Quarterly Review, vol. xxxix. p. 52.

(m) 1st Rep. of Com. on Pub. Rec. App. p. 53.

(n) See the title of the work containing this calendar, which embraces various other subjects, given at length, Cooper on Pub. Rec. 1, p. 306, n. 16.

(o) Marryson Barony, 2 Min. Ev. p. 107.



proceedings at each coronation are contained in one Roll, the claim recorded therein may be easily referred to.(p)

In the claim to the Marston Barony, in 1818, several steps in the pedigree of the petitioner were proved by the Coronation Rolls of almost every Sovereign from Ric. 2 to Geo. 2, shewing upon each occasion, the right of the ancestors of the petitioners to exercise the office of champion, from their tenure of the manor of Scrivelsby, containing statements of pedigree, and evidencing the course of descent of the petitioner's family.(q)

The Pipe Rolls are described as containing "an account of the ancient revenue of the Crown, written out in process every year, to the several sheriffs of England, who were the general receivers and collectors thereof, and by them levied and answered to the Crown upon their annual accounts, before the clerk of the pipe; which method is continued for so much of the said revenue as yet remains, and hath not been alienated from the Crown; for all which, the respective sheriffs still continue to account, and take out their *quietus* yearly."(r) The earliest roll of this kind now remaining has been attributed to the 18th year of Hen. 1, the 5th of Stephen, and the 1st of Hen. 2; but there is good internal evidence for assigning it either to the 26th or 30th of Hen. 1. The next which occurs is the 2nd of Hen. 2, and from that time downwards the series is nearly complete.(s)

The entries on the more ancient of these rolls are of an extremely [ \*625 ] miscellaneous description, owing to the great number in former times of the sources of royal revenue. The following are some of the principal particulars to which these Records relate:—Reliefs, escheats, fines for granting the wardship of infants; fines not to grant such wardships; fines from knights to have wards in marriage; fines from wards not to be given in marriage; fines from the Jews on every imaginable occasion; fines from knights for license to defraud them; from the Jews for protection from being defrauded; fines for aids, scutages, tallages and customs; fines to have justice and right, for writs, pleas, trials, and judgments, for expedition of pleas, trials, and judgments, for delivery of pleas, trials, and judgments; fines payable out of debts to be recovered; fines for having offices by tenants in capite, for leave to marry, for leave to trade, for the king's favour, for his protection and aid, for his mediation, for seisin, for replevin or bail, for acquittal, for murder, manslaughter, trespass, and misdemeanor; fines for leave to settle duels, &c.(t) Most of these particulars may be genealogically useful, but chiefly those which relate to the profits accruing to the king from the incidents to tenure.(u) The course taken by lands held in capite is thereby seen.(v) These Rolls were formerly kept in the Court of Exchequer, at Westminster, but in 1800 they were removed, pursuant

(p) 1st Rep. of Select Com. on Pub. Rec., App. (A) p. 54, (D) p. 84.

(q) Min. Ev. pp. 25, 107.

(r) 1st Rep. of Select Com. on Pub. Rec., App. p. 161.

(s) Preface to the Fragment of the Great Roll for Normandy, apud Cooper on Pub. Rec. vol. i. p. 316.

(t) Grim. Orig. Gen. p. 37.

(u) Madox describes the great Roll of the Pipe as "the most stately Record of the Exchequer, and the great medium of charge and discharge of rents, services, and debts due to the crown." Hist. Exch. vol. 11, p. 114.

(v) Cooper on Pub. Rec. vol. 1, p. 317.

to the direction of the committee on Public Records, to the vaults under the eastern wing of Somerset House. They have recently been transferred to the Carlton Ride; and are in a course of publication by the Record Commissioners.

The Pipe Rolls in Ireland commence with the reign of Hen. 3. They are described as principally composed of the returns of the receipt and expenditure of the royal revenue contained in escheators' and sheriffs' accounts; in addition to much general information, they are said to "throw great light on the history of private property, and the genealogy of the principal persons in the kingdom."<sup>(w)</sup> An examined copy of the Great Roll of the Pipe, 12 Ed. 1, in Ireland, was put in evidence to show, by a fine \*for non-attendance in Parliament, that Peter de Bermingham was entitled to sit.<sup>(x)</sup> [ \*626 ]

So early as the time of the Plantagenets this Roll of the Exchequer was referred to for evidence connected with descent, although not for the express purpose of proving a pedigree. In 40 Hen. 3, the King took homage of William Longspee, son and heir of Idonea, late wife of William Longspee, for all the lands which were Idonea's. The abbot of Pershore, the King's escheator, was ordered to take security of William for fifty shillings for his relief; but afterwards, upon searching this roll of the Exchequer, it was found that the said Idonea held of the King, in capite, two baronies; whereupon it was adjudged by the Court of Exchequer that the said William should pay to the King two hundred pounds for his relief for the said baronies.<sup>(y)</sup>

In the claim of Katherine Bokenham to the Barony of Berners, in 1717, the Pipe Roll of 21 Eliz. was referred to, in proof of part of the pedigree of the claimant.<sup>(z)</sup>

Dugdale, Collins, and other genealogical writers, have made great use of this record; as a reference to any of the pedigrees traced by them and published, will prove. Amongst these the Russell family is indebted to it, for the pedigree commences by stating that this illustrious family has been for many ages possessed of a large estate in the county of Dorset, as is manifest from the account of the sheriff, in 1202, the 3rd of King John, when John Russell gave fifty marks for license to marry the sister of a great man called Doua Bardolf.<sup>(a)</sup> This sheriff's account proving John Russell's existence, marriage, and estate, is obtained from the Pipe Roll, and the particulars of these parties exist on no other record.

The following instances will at once exemplify the variety of matters entered on the roll, and the use that may be made of it by the genealogist.

\*In the pedigree of De Croun, Dugdale cites the Pipe Roll of 28 Hen. 2, containing an entry, stating that Maurice De Croun gave a fine of 200 marks to the King for his license to marry the widow of Albert Greste, and to enjoy her dowry.<sup>(b)</sup> [ \*627 ]

(w) Rep. from Com. on Pub. Rec. of Ireland, vol. ii. 77.

(x) Athenry Barony. Min. Ev. p. 7.

(y) Grim. Orig. Gen. 40. Cruise on Dign. p. 33. Madox, c. 10, s. 4.

(z) Collins, 349.

(a) Collins's Peerage. Sir E. Brydges's ed., vol. i. p. 362.

(b) Dugdale's Baronage, vol. i. p. 412.

The Pipe Roll of 43 Hen. 3, is cited by Dugdale, in the pedigree of Mortimer, of Ricards Castle, to shew that Hugh de Mortimer, son and heir of Robert, upon the death of William de Stutevil, husband to Margery de Say, his mother, on paying one hundred pounds for his relief, had livery of all those lands of her inheritance, which he the said William held as tenant by the curtesy.(c)

In the pedigree of Lacy, Dugdale cites an entry in the Pipe Roll of 6 Ric. 1, stating the payment by Walter Lacy of an aid for the King's redemption of 51*l*. 10*s*.(d) In 10 Ric. 1, this Walter Lacy gave the King 2000 marks for his favour, and to have the livery of his lands; but this being the last year of King Richard's reign, King John immediately succeeding exacted of him no less than 1200*l*. for the like favour and livery.(e)

In the pedigree of D'Arcy, Dugdale cites the Pipe Roll of 29 Hen. 3, to prove the payment by Norman D'Arcy of 30*l*. upon assessment of the aid for marrying the King's eldest daughter; and that of 38 Hen. 3, to show his payment of 40*l*. upon collection of the aid for making the King's eldest son a knight.(f)

The *Memoranda* Rolls contain entries of a vast variety of matters connected with the King's Exchequer of account. They commence in the reign of Hen. 3, and continue to the present time.(g) They have been transferred with other records of the Lord Treasurer's Remembrancer's Office from Somerset House to the Carlton Ride. The Index to the *Memoranda* Rolls posterior to Hen. 7, was published by Jones, in 1795, and an abstract of them has [ \*628 ] been ordered by the Record Commissioners to be made which is now in progress.

In the claim of Margaret Fenys to the Barony of Dacre, in the time of Eliz. and Jac. 1, the marriage of Ralph de Dacre with Margaret, daughter and heiress of Thomas de Moulton, was proved by an entry on the *Memoranda* Roll, 6 Edw. 3, of the payment by them of 13*s*. 4*d*., as their reliefs.(h) There are other Rolls, called *Memoranda*, of a similar nature to these, which were formerly kept in the office of the Queen's Remembrancer at Westminster; they also have recently been deposited in the Carlton Ride, where inventories and calendars of them will be prepared.(i) Other Rolls from the same office are now in the Stone Tower at Westminster Hall, and in the Exchequer Office in the Inner Temple.(j)

The *Memoranda* Rolls of Ireland commence in the 1 Edw. 2, and continue to the present time. They are stated to be of a far more miscellaneous nature than those of the Exchequer in England, at least as far as the latter has been described by Madox.(k)

The *Originalia* are the estreats transmitted from the Court of Chancery in the office of the Lord Treasurer's Remembrancer in the Exchequer, of all grants of the Crown enrolled on the Patent and other Rolls, whereon any rent was reserved, any salary payable, or

(c) Vol. i. p. 152. (d) Vol. i. p. 97. (e) Vol. i. p. 97. (f) Vol. i. p. 370.

(g) 1st Rep. of Select Com. on Pub. Rec. p. 155, where see further account of them.

(h) Collins, p. 47.

(i) 4th Rep. of Dep. Keep. of Pub. Rec. 1843, p. 18. Law Mag. vol. 30, p. 383.

(j) Rep. of Rec. Com. 1837, App. pp. 154. 194.

(k) Rep. on Pub. Rec. of Ireland, vol. ii. p. 633.

any service to be performed, which extorts commence about the beginning of the reign of Hen. 3, and are continued to a late period.(f) These records are now in the Carlton Ride.

An abstract of some of these Rolls has been printed by the Record Commissioners. It commences with the Roll of 20 Hen. 3, the earliest record of this return discoverable, and concludes with the end of the reign of Edw. 3. It has been compiled from a \*care- [ \*629 ] ful examination of the office repertories with the records themselves; the former, though of considerable use, having been found not deserving of implicit reliance. Indexes *rerum*, *locorum*, and *nominum* are subjoined to each volume.(m) An index to the more modern part of the *Originalia* (from Hen. 8, to Anne) has been published by Mr. Edward Jones.(n)

The *Originalia* Rolls, containing a writ 23 Edw. 3, to the escheator, commanding him to give seisin of certain lands to the heir found by the inquisition, were produced in the claim of Lewis Dymoke to the Barony of Marmyon, to prove that descent.(o)

The Liberate Rolls contain precepts directing the payment of sums of money, or to a sheriff to deliver possession of lands of goods which had been extended. They begin in second Joh. and end with the reign of Edw. 4. They are chronologically arranged, and are referred to in the general calendar of the records in the Tower, where they are deposited.(p)

The Fine Rolls in the Tower begin in the sixth year of the reign of King John, and end with that of Edward 6. They contain entries of fines paid to the King for licenses to alienate lands; fines *pro exoneracione militum*, *pro licentia concordandi*, and occasionally liveries of lands, &c. These rolls are arranged in chronological order, and are pointed out in the general calendar.(q)

There are other Fine Rolls of later date in the Rolls Chapel. These commence with the reign of Edw. 5, and end with the 17th year of Car. 1. These are sometimes called the Lord Treasurer's Rolls, and appear to contain a greater variety of matter than those in the Tower. Inrolments of patent offices in the gift of the Lord Treasurer, of general liveries of lands held *in capite*, and entries of writs *de diem clausit extremum*, &c., are to be found in these records.(r)

\*In the claim of Sir W. Jerningham to the barony of [ \*630 ] Stafford in 1809, to prove that Robert de Stafford had livery of all the lands of which his brother, Henry de Stafford, died seised in the 25 Hen. 3, the original Fine Roll of that year was produced in evidence from the Tower.(s)

The Rolls of Redisseisin contain writs to, and proceedings of, sheriffs, for restoring to the possession of lands or tenements those who had been unlawfully dispossessed. They are digested in chronologi-

(f) 1st Rep. of Select Com. on Pub. Rec. App. p. 155.

(m) Preface to Abs. of Originalia.

(n) Cooper on Pub. Rec. vol. i. p. 343.

(o) Min. Ev. p. 23.

(p) 1st Rep. of Sel. Com. on Pub. Rec., App. p. 54.

(q) 1st Rep. of Select Com. on Pub. Rec. App. p. 54.

(r) 1st Rep. of Select Com. on Pub. Rec., App. p. 85.

(s) Min. Ev. p. 5, and see Camoys Barony, Min. Ev. pp. 33. 35.

cal order, and are pointed out in the general calendar of the records in the Tower, where they are deposited.(t)

The Confirmation Rolls, which are preserved in the Rolls Chapel, begin with Ric. 3, and end in 12 Jac. 1, none having been made up since that time. They contain confirmations of charters to cities, boroughs, or other bodies corporate or politic, and also to private persons, and all confirmations since that time have been enrolled promiscuously with other patents on the Patent Rolls.(u)

The returns to writs *de probatione ætatis* are amongst the records of Chancery deposited in the Tower. They do not appear to have been ever kept as a distinct class; but are mixed up with records, described as Miscellaneous Rolls by the Record Commissioners. Hence no calendar or index to these records has existed, and though "of the highest importance for the establishment of pedigrees,"(v) they have been comparatively unknown and inaccessible. The nature of these document, and the occasions on which the writs were issued, are explained in a former page, where also will be found some instances of their utility as genealogical evidences.(w) Upwards of six hundred and thirty-one of these important documents have been brought to light, in the course of examining the Miscellaneous Rolls above mentioned. The earliest of these is dated in the 10 Edw. 3, [ \*631 ] and the latest in the 51 Edw. 3. It is probable \*that more will be discovered in the progress of the examination. Catalogues of those already found have been prepared, which present, in a tabular form, the name of the person who was the subject of the inquiry, the result of the inquiry, and the county where it was made.(x)

The ancient *placita*, or Rolls of the *Curia Regis*, form another most curious fund of information to the historian and genealogist. They are the records of pleadings in our several Courts, and the judgments thereon, from an early period, and their contents are, consequently, of a very miscellaneous character; amongst them will be found pleadings concerning heirships and the proof of age and pedigree, honours and baronies, upon writs of *quo warranto*, and other topics, not necessary to be detailed here. Many of the proceedings on the *placita* are also to be found in the *quo warranto* and Hundred Rolls.

Amongst these records may be particularized the Rolls of the King's Bench, from 1 Ed. 1, to the end of Hen. 5, and of the Common Pleas, from the same date to the end of Hen. 7. They have lately been deposited in the Carlton Ride.

The most material of these pleadings and judgments, from the 6 Ric. 1 to the end of Edw. 1, have been printed under the authority of the Record Commissioners, in a volume entitled, "*Abbrevatio Placitorum*," with a copious index *rerum*. This work contains abstracts and selections from the *placita*, and though extremely defective,

(t) 1st Rep. of Select Com. on Pub. Rec., App. p. 54.

(u) 1st Rep. of Select Com. on Pub. Rec., App. p. 85.

(v) Third Rep. of Dep. Keep. of Pub. Rec. p. 23.

(w) Sup. p. 431.

(x) These catalogues are printed in the Third Report of the Dep. Keep. of Pub. Rec. App. II. 5 c, p. 202, and the 4th Rep. App. II. 5 b, p. 131.

from the number of entries left unnoticed, is yet a valuable acquisition.

With respect to these Rolls, it has been observed, that if they were, according to a suggestion made to the Record Commissioners, to be published in English, it is apprehended there would scarcely be a person of family, or possessing real property, who would not be able to trace therein some evidence of his pedigree, or of the ancient rights, privileges, and franchises formerly attached to the property he now enjoys.(y)

\*In the claim of Margaret Fenys to the Barony of [ \*638 ] Dacre, in the reign of Queen Elizabeth, the marriage of Thomas de Moulton with Maud, heiress of the family of Vaux, was proved by an entry in the *Placita coram Rege*, 43 Hen. 3, in which said Thomas claims to be patron of the priory of Lanercost, through Matilda his wife, who was the heiress of the founder.(z) Several other links of the claimant's pedigree were proved by the *Placita* Rolls of Azzize of Ed. 1 and Ed. 2.(a)

In the year 1554, Edward Kynaston, Esq., who claimed to be heir to the Barony of Powis, filed a bill in Chancery against certain persons named Vernon, charging them with setting up a pretended title to be heirs to the last Lord Powis; and he afterwards examined witnesses (two of whom had attained their respective ages of one hundred years) in *perpetuam rei memoriam*. Nearly two centuries afterwards this evidence was made use of by his descendant, John Kynaston, in a renewal of the same claim; and the only evidence of the marriages of two of the parties in the pedigree, were the *placita* of the Queen's Bench for the years 1571, 1575, and 1590.(b)

The ancient *placita* of Ireland begin with the thirty-sixth year of Hen. 3. They contain a similar profusion of information on various topics to those of England.(c) An attested copy of an extract from the Irish Plea Roll of 31 Edw. 1, containing a claim for dower of Johanna, widow of Meiler de Bermingham, eldest son of Peter de Bermingham, and also a petition of the said Peter, against the escheator who had seised certain lands, on the death of the said Meiler, were put in evidence in the Athenry claim.(d)

The Fine and Recovery Rolls of the Court of Common Pleas form an important branch of the Records. The earliest of the fines were originally among the Records in the Chapter House, but in the reign of Hen. 8, the practice of enrolling them there appears to have ceased, and they have since that time been \*deposited in various [ \*639 ] offices connected with the Court of Common Pleas. In the Chirographer's Office records of all fines, with the names of the parties, were regularly entered in books. In the Prothonotary's Office were recorded entries of *præcipes* for suffering recoveries, with the names of the parties, and description of the lands. These Rolls from the Chirographer's and Prothonotary's Offices were, in 1809, removed

(y) Coop. on Pub. Rec. vol. 1, p. 245.

(z) Collins's Claims to Baronies by writs, title Dacres, 47.

(a) In the same case were cited the *Placita de juratis et assisis*, 7 Edw. 1, ib. 56.

(b) Grim. Orig. Gen. 114. Collins, title Powys, 398, 399.

(c) Rep. Com. Pub. Rec. Ireland, Min. Ev. vol. 2, p. 79.

(d) Athenry Barony, Min. Ev. 8. 10.

to the Chapter House, (e) whence, together with those originally enrolled, they have recently been removed to the Carlton Ride. Various Rolls of the Court of Common Pleas, from 7 Hen. 3, to 19 Edw. 2, and various Essoin Rolls from 10 Hen. 3, to 38 Edw. 3, have been removed to the same repository from the Tower. (f)

Other Rolls of the Court of Common Pleas, formerly preserved in rooms adjoining the Court at Westminster, have also been deposited in the Carlton Ride. Amongst these were a large class described as *placita terræ*, containing recoveries, proceedings in *quare impedit*, dower, and frequently partition. They are described as being of very great importance, on account of the evidences of title which they contain. (g)

Inventories and calendars of a great number of these different Rolls have been commenced, and are in course of formation. (h) The value of these records, as showing the transmission of lands, and affording evidence of descent, need not be enlarged on, but may be easily exemplified. Thus, in a recent claim of Peerage, an original fine of 12 Hen. 7, and another of 18 Hen. 7, and the Common Pleas Roll for the same years, containing the licenses for concord, and a recovery suffered of certain lands by Sir W. Radmylde, were put in evidence, to show the want of issue of Sir William, by his mode of dealing with the lands. (i)

The earliest records of suits in Chancery at present known to exist [ \*634 ] are of the 17th year of Ric. 2. The petitions in that reign \*are numerous, but during the two succeeding reigns comparatively few appear to have been filed. From the commencement of the reign of Hen. 6, the bills, petitions, and other proceedings in Chancery have been preserved with great regularity; at that time too the use of the English language, which had been partially introduced in the preceding reign, became generally adopted in those pleadings, instead of the French. But few decrees in those early periods have been discovered. (j) The original records of the earliest date are preserved in the Tower of London.

Calendars of some of the proceedings in Chancery have been published under the authority of the Record Commissioners, from the Records in the Tower. This work does not notice any of the proceedings prior to the reign of Queen Elizabeth, and embraces the period from 1558 to 1693. The calendars state the names of the plaintiffs and defendants, the object of each suit, and the name and situation of the lands in dispute, with sketches of the nature of the claims, alphabetically arranged under the names of the plaintiffs. It is, perhaps, to be regretted that the earlier pleadings have not been noticed in the calendars; but the work, in its present form, is of great value. Besides the records of Chancery proceedings in the Tower, the judgment or Decree Rolls in the Rolls Chapel should be noticed. They contain the decrees and dismissals of the Court of Chancery

(e) Rep. Rec. Com. 1837, App. p. 12. (f) 4th Rep. of Dep. Keep. of Pub. Rec. p. 14.

(g) Report of Mr. Hewlett. Rep. Rec. Com. 1837, App. p. 132. 4th Rep. of Dep. Keep. Pub. Rec. 1843, p. 15.

(h) A list of these is given in the report last referred to, to which several of them are appended. See Report, p. 18.

(i) Camoy's Barony, Min. Ev. pp. 39. 41. 49, 50; ib. 6. Fine, 23 Hen. 7.

(j) Preface to Calendars of Proceedings in Chancery.

enrolled in the Six Clerks' Office. They begin about the 25 Hen. 8, and continue to about the 6 Geo. 3. There are complete calendars or indexes to these rolls, under the names of plaintiffs referring to each decree.(k)

Some idea of the value of the matter to be extracted from the pleadings in Chancery may be formed from the following statement :—"In the claims to the estates of the late Duchess of Norfolk, the Scudamore pedigree was traced from the reign of the Tudors; every known collateral branch was inserted, and the births, marriages and deaths, of nearly every individual, descending from every collateral branch, for nine generations, were proved by registers, wills, inquisitions *post mortem*, and other documents. Many thousand title deeds [ \*635 ] were brought into Court and indexed, as was also a multitude of documents relating to the Scudamores and their connexions; and thus are the archives of Equity Courts often found to contain records and particulars of families which are not now to be discovered in any other depository in the kingdom."(l)

In the claim of Katherine Bokeham to the Barony of Berners, a bill in Chancery, temp. Hen. 8, was part of the evidence for the claimant.(m)

In an old case reported in Dyer, it appears that an exemplification of depositions taken in Chancery to prove one's being of age when he levied a fine, was allowed as evidence, and the jury regarded them more than the fine's being reversed for non-age.(n) And it is observable that the depositions were made to establish the very point which was at issue in the cause where this exemplification was afterwards put in.(o)

The most ancient depositions in suits in the English Court of Chancery now preserved in the Tower of London, were taken in the reign of Hen. 8.(p) The Master's Reports kept in the Report Office, Chancery lane, do not commence before the reign of Elizabeth. It seems that the earliest affidavits in Chancery suits discoverable in the Affidavit Office, Symmond's Inn, do not date from a period more remote than the reign of Charles 1.(q)

The earliest Chancery proceedings discovered in Ireland are of the reign of Hen. 8.(r)

Before quitting this branch of the subject, it will be proper shortly to notice the important changes which have taken place in the management of the public records, under the operation of the Act 1 & 2 Vict. c. 94. The number of separate buildings or offices [ \*636 ] has been much reduced. The Tower of London, the Rolls Chapel and House, the Carlton Ride, the Chapter House, and Stone Tower at Westminster, at present contain all the records which, by the statute were put under the control of the Master of the Rolls; and the Deputy Keeper of the records, in his fourth report, dated July, 1843, expresses a hope that the two latter will shortly be disused.(s)

(k) First Rep. Sel. Com. Pub. Rec. App. p. 86.

(l) Grim. Orig. Gen. 91, 92.

(m) Collins, 343.

(n) Vin. Ab. Ev. A, b, 33, pl. 4. Dyer, 391, pl. 40, 13 Eliz.

(o) As to the admissibility generally of these records, see post, ch. 9.

(p) Ancient depositions used in Powys claim. Collins, title Powys, p. 398, 399.

(q) Cooper's Pub. Rec. vol. 1, p. 357.

(r) Rep. Com. Pub. Rec. Ireland, vol. 1, p. 67.

(s) Page 38.



With a few comparatively unimportant exceptions, all the records of Her Majesty's three Courts of Common Law at Westminster, under the control of the Master of the Rolls, are now deposited in one building, the Carlton Ride. Free access to the records has been secured for the public by the provision of uniform and regular attendance at each office, and by the removal of obstructive fees and regulations; and lastly, numerous inventories, catalogues, calendars and indexes are in a course of preparation, by which the reference to any particular record will be materially facilitated. A list of these will be found in the fourth report of the Deputy Keeper of the Public Records.<sup>(t)</sup>

Some observations have already been made upon various classes of the Irish Records. The most important of them, as connected with the objects of this Treatise, appear to be the plea Rolls and great and small Rolls of the Pipe, which are in the Bermingham Tower; the patent and close Rolls in the Rolls Office; and the *Memoranda* Rolls in the Chief Remembrancer's Office. Considerable attention has lately been paid to the Irish, as well as the English Records; and much care appears to have been bestowed, as well upon the preservation and arrangement of them, as upon the preparation of calendars, indexes, and repertories, by means of which access may be more readily obtained to their contents. Calendars and indexes to a large proportion of the close and patent Rolls have been prepared and are in progress, and a repertory to the decree Rolls of the Exchequer, down to 1767, was completed so long ago as the year 1827.<sup>(u)</sup> A classified schedule and general inventory of the *Memoranda* Rolls in the office of the Chief Remembrancer will be found in the report of the Commissioners of Public Records of Ireland.<sup>(v)</sup>

[ \*637 ]

## \*CHAPTER IX.

## JUDICIAL WRITINGS.

THE course which has been followed in treating of the ancient public records, consisting, as many of them do, of judicial proceedings, brings us to the consideration of judicial proceedings generally, including those which are not records, and the use which may be made of them as a source of genealogical evidence. It should be borne in mind that matters of pedigree may be established by evidence of reputation; and therefore it is obvious that judicial proceedings, as a source of evidence, may be considered in two points of view: either as direct evidence of a fact, or as evidence of the prevailing reputation respecting such fact. In the present chapter this branch of evidence will only be considered with reference to the first of these points; the other being reserved for a subsequent chapter, in which the subject will be treated at length.

The judgments and verdicts of the superior courts being matters of

(t) Page 29.

(u) See Report of Commissioners of Pub. Rec. Ireland, 1827, p. 19.

(v) Page 522.

record, no evidence is admitted to contradict them :<sup>(v)</sup> but they are not, therefore, admissible as evidence of every fact which might be inferred from them. Perhaps the general rule on this subject cannot be better stated than in the language used by C. J. de Grey in the *Duchess of Kingston's case*.<sup>(w)</sup> He deduced from the variety of cases the following propositions: first, the judgment of a court of concurrent jurisdiction directly upon the point, is as a plea a bar, and as evidence conclusive, between the same parties, upon the same matter directly in question in another Court: secondly, the judgment of a Court of exclusive jurisdiction directly upon the point, is in like manner conclusive upon the same matter between the same parties, coming incidentally in question in another Court, for a different purpose. But neither the judgment of a concurrent nor exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment.<sup>(x)</sup> [ \*638 ]

Two points then require particular attention, in considering whether verdicts or judgments can be successfully tendered in evidence: first, the identity of the parties: secondly, the identity of the subject-matter. The identity of parties is not a question of much difficulty. The rule may be stated to be, that verdicts and judgments are not in general admissible for or against strangers to the proceedings in which they were obtained. And this rule prevails, although the truth of the fact to be established, is a necessary inference from the verdict or judgment sought to be put in evidence.

Thus in a trial at bar in ejectment, wherein the legitimacy of the Duke of Albemarle was the only question, it was ruled by the Court that a former verdict between other parties, concerning other lands, depending upon the same question and title, could not be read in evidence.<sup>(y)</sup>

It is proper to observe, however, that the identity of parties in contemplation of law, with respect to this rule of evidence, may be either actual or constructive. Thus in ejectment, the lessor of the plaintiff and the tenant being substantially the real parties, a judgment recovered by the defendant in a former ejectment, is admissible in evidence against the lessor of the plaintiff in a second ejectment, where the lessor of the plaintiff and the defendant are the same parties.<sup>(z)</sup> So it has been held that verdicts and judgments are receivable in evidence against the parties on whose account the suits in which [ \*639 ] they were obtained, were instituted or defended.<sup>(a)</sup>

Identity of interest seems in some cases to be construed into, or at least to stand in the place of, identity of parties, in the application of this rule. Thus verdicts and judgments are admissible between parties who are in privity with the parties to the former proceedings. And

(v) 1 Co. Lit. 260, a.

(w) 20 How. St. Tr. 355.

(x) It has been objected that the principles laid down by the Chief Justice present an inadequate, and in some measure, incorrect view of the state of the law, on this subject. See the observations on this point, 1 Phil. on Evidence, p. 558, 8th ed. The learned author of that treatise, admits the difficulty of laying down general rules applicable to the subject.

(y) *Clarges v. Sherwin*, 12 Mod. 343; *M. T.* 11 W. 3.

(z) *Doe d. Strode v. Seaton*, 2 Cr., M. & R. 731.

(a) *Kinnarsley v. Orpe*, 2 Doug. 517. *Hancock v. Welsh*, 1 St. 347.

this, whether the privy be by blood, in law, or by estate. A verdict for the ancestor may be given in evidence by the heir who is privy in blood.(b) A verdict against an unmarried woman is admissible against herself and a subsequently taken husband, who by such marriage becomes privy in law.(c) With respect to privies in estate, it has been held that a verdict for one in remainder may be given in evidence for one next in remainder, under the limitations of the same deed:(d) and that a verdict for or against a lessee, is evidence for or against the reversioner.(e)

And as actual identity of parties is not in all cases necessary, so neither where it exists without identity of character, will it be sufficient. Thus a verdict or judgment in one suit will not be evidence against the same party appearing in another character in another suit.(f)

The second point above mentioned, as requiring attention, namely, identity of matter, gives rise to rather more difficulty on account of the qualification which follows the two propositions stated by C. J. De Grey; "that the matter must have been directly, and not collaterally in question." It seems, from the cases, not always easy to distinguish what is to be considered a direct decision on the matter, for the purpose of applying the rule under consideration. The question has frequently occurred with reference to the \*conclusiveness of [ \*640 ] judgments of the Ecclesiastical Courts, as Courts having exclusive jurisdiction, respecting the validity of marriages, or the right to administration.

The conclusiveness to the Temporal Courts of sentences in the Ecclesiastical Courts determining the question of marriage has been discussed in a former page.(g)

The cases of *Bouchier v. Taylor*,(h) and *Thomas v. Ketteriche*,(i) have been cited, as proving that in grants of administration to the next of kin after a suit, the proximity may be directly determined by the sentence, so as to make it conclusive evidence of such proximity, in suits for distribution.(j)

It would appear, from a recent case, that not only must the proximity of kindred be directly decided in such a suit, but also the facts upon which that proximity depends must be the proper object of the suit, or the sentence will not be conclusive in another Court. In a suit for distribution, the plaintiff claimed to be niece and sole next of kin of the intestate. There had been a suit for administration between the plaintiff and the defendant in equity, the latter of whom claimed to be second cousin, and next of kin. The decree of the Prerogative Court pronounced that *as far as it appeared from the evidence in the cause the deceased died without a parent, brother or sister, uncle or*

(b) *Locke v. Norborne*, 3 Mod. 141.

(c) *Outram v. Morewood*, 3 East, 345, and see for other instances of privies in law, the cases of *Rex v. Hobden*, Andr. 389, *Lord Brounker v. Atkins*, Skin. 15, *Berry v. Banner*, Peake, 156, *Travis v. Chaloner*, 3 Gwill. 1237, *Carr v. Heaton*, ib. 1261.

(d) *Pyke v. Crouch*, 1 Lord Raym. 730. And see *Bishop of Lincoln v. Ellis*, Bonb. 110.

(e) Per Curiam, in *Rushworth v. Countess of Pembroke*, Hard. 472. For more particular information as to the identity of parties requisite to make judgments admissible, see Phil. & Am. on Evidence, vol. 1, p. 514, et seq. and the cases cited there.

(f) *Robinson's case*, 5 Rep. 32 b.

(g) 4 Brev. P. C. 708, ed. Toml.

(h) Sup. p. 264, et seq.

(i) 1 Ven. sen. 333.

(j) Sup. p. 44.

aunt, nephew or niece, or cousin german, and intestate, leaving the defendant in equity her lawful second cousin and next of kin: And that S. H. B., the plaintiff in equity *had failed in proof* that she was the lawful niece and next of kin of the said deceased: and letters of administration were granted to R. J. The ground of this sentence appears to have been the alleged illegitimacy of the father of S. H. B. At the hearing of the cause in Chancery, it was contended, on the part of the defendant, that the adjudication of the Ecclesiastical Court was conclusive on the question of pedigree, which was the question of fact raised in the Court of Chancery, and that the plaintiff's bill ought to be dismissed. The V. C. Knight Bruce, after taking time to consider, decided against the conclusiveness of that sentence, and directed an issue for the purpose of trying the \*question of fact. His [ \*641 ] Honour stated that he was not prepared to say, that, according to the proper sense of the expression, the judgment of the Ecclesiastical Court was directly upon the point of the alleged illegitimacy of the plaintiff's father, and had the establishment of that supposed fact for its proper purpose and object, so as to render his illegitimacy *rem judicatam* between the parties, on a question of distribution.(k)

It seems that where the fact, in evidence of which a judgment is tendered, was not expressly in issue, parol evidence is not admissible to shew that it was nevertheless in fact expressly decided: assuming the parol evidence to be admissible, still, on the authority of the dictum of C. J. De Grey, the judgment could not be received.(l) It has been remarked, however, that if the parol evidence were admissible that dictum seems not to apply.(m)

In the Gardner Peerage case, a doubt was intimated by the House whether the production of the libel, defensive allegations, and sentence of the Ecclesiastical Court in an action for divorce, would make all the facts contained in those proceedings, evidence on a claim of Peerage, against one who was no party to the suit in the Ecclesiastical Court.(n)

Proceedings in a writ of right reciting a pedigree, not disputed by the opposing party, have been held inadmissible on a claim of Peerage, even as evidence of reputation.(o)

In like manner it appears that the House of Lords will not, of course, receive proceedings before the Privy Council on a claim of Peerage, as evidence, on the same footing as proceedings before Committees of Privilege. But it being shewn that the House had acted upon the proceedings in question, they were permitted to be received as evidence *de bene esse*.(p)

\*A decree in the Court of Chancery, though not strictly [ \*642 ] a Court of Record(q) may in general be given in evidence on the same footing, and under the same limitations, as the verdict or judgment of a Court of Common Law. On a trial touching the right

(k) *Barre v. Jackson*, 1 Y. & Col. C. C. 583. This decision has been appealed from, but the judgment has not yet been given.

(l) Per Bayley, J., in *Rex v. Knaptoft*, 2 B. & C. 883, (9 E. C. L. R.)

(m) Phil. and Amos on Evidence, 1, p. 529, n. (5.)

(n) *Gardner Barony*, by Le Marchant, p. 6.

(o) *Camoy's Barony*, Min. Ev. p. 245.

(g) *Co. Lit.* 260.

(p) *Fitzwalter Bannay*, Min. Ev. p. 3.

to lands, decrees in Chancery between other parties concerning the same lands, were held admissible in evidence, to shew the character in which the possessor enjoyed the lands.(r)

The House of Lords, however, will not always receive a decree as evidence. Thus in the Roos Peerage case, an original decree of the Court of Chancery was offered in evidence to prove that the petitioner was the only child of the Honourable Charlotte Boyle Walsingham, but being objected to by the Attorney-General, the evidence was rejected. The ground of objection is not stated; probably it was thought that the fact being modern, was capable of better proof.(s)

Where a party intends to avail himself of the contents of a decree in evidence, the regular course is to prove the proceedings on which the decree was founded.(t)

This rule is observed in the House of Lords in claims of Peerage. A decree in the Court of Chancery in Ireland was offered in evidence to prove that a settlement was made upon a certain marriage, and that the marriage afterwards took effect, the original settlement being lost; but the counsel were required to produce the bill and answer.(u) So in the Gardner case, the sentence of the Ecclesiastical Court in the action of divorce brought by Captain Gardner against Mrs. Gardner, was produced as evidence of that action. The committee declared that the sentence alone without the libel and defensive allegations was not sufficient. The claimant must proceed in the same manner as was done in the bill for the divorce: the evidence as between Captain Gardner and Mrs. Gardner could not be evidence as against Henry Fenton Gardner, unless all the proceedings were produced.(v)

[ \*643 ] \*Except in some special cases the production of the original Record is unnecessary. The copies of Records which are received in evidence, are either office copies, or examined copies. The former are authenticated by some officer who is intrusted with that duty, and such copies are in the same Court equivalent to the original Record, but in another Court require proof that they have been examined. An application having been made to the Master of the Rolls, for an order that the officer of the Court might attend a trial at law, with the original Record of a Bill and Answer in a suit for the perpetuation of testimony, in order to let in the depositions of the witnesses, his Lordship, after consideration, and inquiry into the practice, refused to make the order. He said that in criminal cases, and where it was necessary to prove handwriting, it is usual to order the attendance of the officer with the original Record, but not in other cases, because Records ought not to be moved from their proper place of deposit; and he referred to the observations of the Judges in *Hennell v. Lyon*,(w) as shewing this to be the practice.(x)

The Ecclesiastical Courts are not Courts of Record, and where proceedings in those Courts are required to be produced in other Courts, it seems that the practice is to produce the original documents.

(r) *Davis v. Lowndes*, 1 Bing. N. C. 607, (27 E. C. L. R.)

(s) *Roos Barony*, Min. Ev. p. 344.

(t) Com. Dig. tit. Ev. (A. 4.) p. 85. *Trowell v. Castle*, 1 Keb. 21.

(u) *Barnewall Viscounty*, Min. Ev. pp. 30, 39.

(v) *Gardner Barony*, by Le Marchant, p. 6.

(w) 1 B. & A. 182.

(x) *Attorney-General v. Ray*, Rolls, 11 May, 1843; S. C. 2 Harv. 518.

This is alleged to be the reason why a practice, which formerly prevailed in the Prerogative Office, of binding up answers, &c., in volumes, was some years ago discontinued. The inconvenience of carrying large volumes down to attend trials at the Assizes and elsewhere was found to be great.(y)

A Bill in Chancery is no evidence of the truth of its own assertions or denials,(z) even against the complainant, as in the nature of admissions by him, although an opinion formerly prevailed, that to a certain extent it was evidence.(a) Proof of the Bill is, however, often necessary, in order to let in the answer or depositions, and thus to shew what facts were in issue.(b)

\*The admissibility of bills in Chancery as evidence of pedigree stated in them will be afterwards considered.(c) [ \*644 ]

An answer in Chancery being upon oath, is evidence of a strong nature:(d) and may be used by way of admission, against the party who makes it, even by a stranger to the suit in which it was made.(e) But the answer of an infant by his guardian, admitting a pedigree, cannot be used in ejectment as evidence against the infant.(f) So an answer in Chancery was rejected as evidence of the time of a marriage as between third parties.(g)

It has been seen that in claims of peerage admissions made between the parties to a suit are not received as evidence.(h)

Depositions in Chancery are receivable upon proof of the bill and answer:(i) or, if ancient, without that proof:(j) they may also be read in Chancery, without proof of the bill and answer, by order of the Court.(k) They are not conclusive, however, and in a case above referred to, where the defendant had recovered some verdicts at law, grounded on depositions in Chancery, the evidence appearing unsatisfactory, and there being also contradictory evidence, the jury found for the plaintiff.(l) The examination of a defendant before the Master has been received by the House of Lords upon a claim of peerage.(m)

With respect to judgments in foreign Courts proceeding *in rem*, it appears, that if the matter in controversy is land or other immovable property, the judgment pronounced in the *forum rei sitæ* is of universal obligation; and the same principle has generally been applied as to movable property within the jurisdiction of the Court pronouncing judgment.(n) The effects of sentences \*in foreign [ \*645 ] Courts respecting the validity or invalidity of marriage has been stated in a former page.(o)

In the claim of Alexander Home, Esq., to the earldom of Marchmont, in 1822, a decree of a Scotch court against John Home as *only lawful son* of Sir Andrew Home, was given in evidence before the

(y) Pub. Rec. Com. Rep. 1837, p. 257. (z) Per Lord Kenyon, 7 Term Rep. 3.

(a) B. N. P. 335; Gilb. Ev. 50; Selw. N. P. 744. (b) Per Lord Kenyon, *ubi sup.*

(c) Post, chap. 10. (d) De Whelpdale v. Milburn, 5 Pr. 485, (2 E. Ex. R.)

(e) Ashmore v. Hardy, 7 C. & P. 565, (32 E. C. L. R.)

(f) Eccleston v. Petty, Carth. 79; Comb. 156. (g) Hilliard v. Phaley, 8 Mod. 180.

(h) Slane Barony, Min. Ev. 1820, pt. 2, p. 25; pt. 3, p. 6, *sup.* p. 97.

(i) Gilb. Ev. 62.

(j) Byam v. Booth, 2 Price, 234, (1 E. Ex. R.) See Floyer v. Strackley, 19 Vin. Ab. 57; Nes. Ch. Rep. 7 Car. 1. (k) Palmer v. Lord Aylebury, 15 Ves. 176.

(l) Floyer v. Strackley, 19 Vin. Ab. 57. (m) Fitzwalter Barony, Min. Ev. 165.

(n) Phil. on Ev. 1, 532. (o) *Supra*, p. 344.

committee of the House of Lords, to prove that Patrick Home, the youngest son of Sir Andrew, died before his father : and the marriage of a John Home, was proved by the decree of separation obtained by his wife against him.(p) So in the claim of Sir James Innes to the dukedom of Roxburgh in 1808, the committee of the House of Lords received a copy of a decree in a Scotch cause, to show that Henry and William Kerr died without issue.(q) The House of Lords, in another peerage case, refused to receive a decree of the Irish Court of Chancery in evidence, because it was not accompanied with the bill and answers.(r)

The several places of deposit of the more ancient records of the Courts of Law have been pointed out in the preceding chapter. The records of the Court of Queen's Bench, now deposited in the Rolls House, include those of twenty years' date and upwards. Those of a later date remain in their respective depositories belonging to the court. So the records of the Court of Common Pleas, and of the Common Law side of the Exchequer, of a similar date, and some of the latter court of a more modern date, have been deposited in the Carlton Ride. It is presumed, that the accruing records of all these several courts will be yearly transferred to the same respective repositories.(s)

The records of the Equity side of the Court of Exchequer have been also deposited in the Carlton Ride, with the exception of such of them as were required for the current business of the Court of Chancery. These, upon the abolition of the equity jurisdiction of the Court of Exchequer, were placed in charge of the proper officers of the Court [ \*646 ] of Chancery. Decrees, and entries \*of decrees, for ten years preceding November 1841, and minutes of decrees, and orders from Michaelmas Term 1820, are amongst those thus delivered to the chancery officers.(t)

The records belonging to modern suits in chancery, were retained in the Offices of the Six Clerks, where they were respectively filed, until the abolition of those offices under the act 5 & 6 Vict. c. 103. By the third order of the 26th October, 1842, made in pursuance of that act, the custody of pleadings and records is transferred to the Clerks of Records and Writs. It does not appear that any regularity was observed in the transmission of Chancery records from the Six Clerks' Offices to the Tower, either as respects the intervals at which such transmissions took place, or the periods to which the records transmitted belonged. The last transmission was made in 1832, which included bills, answers, depositions of witnesses, and other pleadings, to which reference is made in six calendars or indexes, marked with the letter A, and endorsed 1714 to 1758. It appears, however, from the mode of arrangement and indexing, most commonly adopted in the Six Clerks' Offices, that amongst the documents referred to in the above-mentioned calendars, some will be found bearing dates prior to, and others subsequent to the years marked in the endorsement.(u)

(p) Minutes of Evidence, Marchmont Earldom, pp. 47. 60.

(q) Minutes of Evidence, Roxburgh Dukedom, p. 116.

(r) Barnewall Viscounty, pp. 30. 39.

(s) 4th Rep. of Dep. Keep. of Pub. Rec. p. 14.

(t) 3rd Rep. of Dep. Keep. of Pub. Rec. p. 6.

(u) 2nd Rep. of Dep. Keep. of Pub. Rec. p. 43.

The custody of the records of the Ecclesiastical Courts, was not affected by the act 1 & 2 Vict. c. 94. They, therefore, continue in the same depositories as formerly. A tolerably full account of the various records of these courts, their places of deposit, state of preservation, and accessibility by means of calendars and indexes, will be found in the Report of the Record Commissioners, 1837. The following are amongst the most important of them with reference to the subjects of this treatise.(v) In the Prerogative Office, in custody of the registrar of the Archbishop of Canterbury, are the acts recording grants of probates of wills from 1526, with the exception of the year 1662, complete to the present time. Acts recording grants of administration \*from 1559, except the year 1662, to the [ \*647 ] present time. Original wills from the year 1484, with many chasms, down to 1660, and from that year to the present time complete. Transcripts of wills, for nearly a similar period; allegations, or pleas, commencing in the year 1665, and continuing to the present time. On the conclusion of the cause, these were filed in yearly bundles, and indexed. The bundles from 1665 to 1800 inclusive, are kept at Lambeth Palace, and from that time at the Prerogative Office. Answers, from the year 1666 to the present time. Until the year 1787, these were bound in large volumes, with indexes, which are in Lambeth Palace. Since 1787, the practice of binding them has been discontinued, as it is said, on account of the inconvenience attending the production of the books at the assizes and elsewhere.(w) Sentences of the court, from the year 1600 to 1797, are at Lambeth; since 1800, they have been kept in the Prerogative Office. Depositions of witnesses, from 1656 to 1788, bound and indexed. These are kept at Lambeth. Subsequent depositions remain in the Prerogative Office, unbound, for the reason above stated respecting answers. Besides these, there are various other documents; such as bonds, exhibits, orders of courts, processes, &c., which may occasionally afford genealogical information.

\* In the Arches Court, will be found answers to pleas, depositions, sentences, appeals, acts of court, and other documents.

In the custody of the Registrar of the Consistory Court of London, are original wills, from the year 1507 to the present time; marriage license affidavits, from 1597 to the present time; marriage license bonds, from 1696 to 1823.(x)

It may be observed generally, respecting the Records of the Ecclesiastical Courts, that considerable regularity and method seems to have prevailed in the arrangement of them, and great attention appears to have been bestowed on indexing them, and rendering their contents readily accessible, as well as in preserving their substance from injury.

(v) Pub. Rec. Com. Rep. p. 257.

(w) *Ibid.*

(x) *Ibid.* p. 265.



## [ \*648 ]

## \*CHAPTER X.

## OF HEARSAY EVIDENCE.

In questions of pedigree hearsay evidence is admitted, from the necessity of the case. As it would be impossible to establish descents according to the strict rules by which contracts are established, and rights of property regulated, courts of law are obliged in matters of pedigrees to depart from their ordinary rules, and to have recourse to a secondary kind of evidence, the best the nature of the subject will admit.(y)

In treating this subject it is proposed to consider first, what are matters of pedigree, in proof of which such evidence is admissible; secondly, the principles and limitations which regulate its admission; and thirdly, the various forms under which it may be found.

It is not easy to define exactly what are matters of pedigree, with reference to the subject under consideration, otherwise than by enumerating them separately. It has been observed, that such points as the following: "who was related to whom; by what links the relationship was made out; whether it was a relationship of consanguinity or of affinity only; when the parties died, or whether they are actually dead," may be proved "as matters relating to the condition of the family," by the declarations of deceased members of the family.(z)

The reader is referred to former pages, for numerous cases illustrative of this branch of the subject. Thus it has been seen [ \*649 ] \*that the fact of death,(a) the failure of issue,(b) the fact of marriage,(c) the birth of a child,(d) and the periods either absolutely or relatively to some other event, at which any of these events took place, may be proved by hearsay evidence.

The age of a person at any given time may be proved by evidence of this nature: as well by declarations speaking generally to that point, as by express statements of the date of his birth. The mention by a father in his will of the time of his child's birth, is, until contradicted, evidence of that fact.(e) Upon a trial at bar, where the question was, whether a testator was of full age at the time of making his will, an almanac, in which his father had made an entry of his birth, was produced, to prove his nonage, and was allowed to be strong evidence.(f)

So in the case of *Kidney v. Cockburn*, it was held that the ages of two persons at the times of their respective deaths, might be proved by means of monumental inscriptions, and the statements of members of their family,(g) and in the argument of that case it was stated, that similar evidence had been recently admitted by *Littledale, J.*(h)

The illegitimacy of a person is a matter which may be proved by the acknowledgment of the reputed father, and by general reputation,

(y) 13 Ves. 143.

(z) *Per Brougham, C., Moncton v. Attorney-General*, 2 R. & M. 156.

(a) Sup. p. 165. 184.

(b) Sup. p. 204.

(c) Sup. p. 245.

(d) Sup. p. 427.

(e) *Vulliamy v. Huskinson*, 3 Y. & Col. 80.

(f) *Herbert v. Tuckal*, Sir T. Raym. 84.

(g) 2 Russ. & My. 167.

(h) *Ryder v. Malbone*, cited, *Ibid.*

and the bastard himself may be examined as to such acknowledgment and reputation.(i) And it has even been held that the declarations of a person himself, that he was illegitimate, may be received, to show that the marriage of his parents took place subsequent to his birth.(j) It was said this evidence was admissible as being the representation of one of the family respecting the degree of relationship which he bore to it. It seems, however, that the declarations in this case amounted rather to a denial, that the person making them was a member of \*the family, and, if properly receivable, could only [ \*650 ] have been received as such against himself; for the legal objection, that a bastard though *de facto*, is not *de jure* a member of the family, has prevailed to the exclusion of his declarations.(k) In the same case of *Cooke v. Lloyd*, opprobrious epithets, implying illegitimacy, applied by the father to the children, and his dying declarations, by which he pointed out a younger child as his heir, were proved.

In the *Berkeley Peerage* the judges gave an unanimous opinion, that evidence of the declarations of a father that A. was his legitimate son, was admissible to prove the legitimacy of A.(l)

General kindred, as that a person was heir to another, being his cousin or relation, is a matter of pedigree, and declarations to that effect are, it seems, receivable in evidence, though the point was formerly considered to be doubtful, at least so far as regarded proof of title in an ejectment.(m)

In a question of legitimacy turning upon the time of birth, the evidence of a witness was tendered, that she had heard her mother (who was the sister of the mother of the alleged bastard,) say, that she had suckled the child; which, coupled with evidence of the time when her own child was born, tended to fix the alleged bastard's birth at a period posterior to its parents' marriage. The evidence had been received on the trial of the issue before Gurney, B., but Lord Cottenham expressed his opinion, that being a declaration of a particular fact, it ought not to have been admitted.(n)

The objection to this evidence might be more explicitly stated. The parentage of a child, its legitimacy, the time of its birth, and indeed all matters of pedigree, may be said to be particular facts. There is this distinction in their favour, that they are all facts which are obviously, and immediately, and at the time of their occurring, important to the family of the child, with reference to their mutual obligations, claims and rights. Each has an interest in knowing [ \*651 ] \*them, though the interest will be proportioned to the degree of the relationship, or the intervention of nearer relations. But in the principal case, the fact declared to had not at the time the remotest bearing upon the relationship of the parties, or their rights in respect of such relationship, and it only became subsequently a fact form which the legitimacy was inferrible by argument.

(i) *Rex v. Nottingham*, 13 East, 58, n.

(j) *Cooke v. Lloyd*, Peake's Ev. App. 78.

(k) *Doe d. Bamford v. Barton*, 2 Moo. & Rob. 28.

(l) 4 Campb. 401, second question.

(m) *Doe d. Fetter v. Randall*, 2 M. & P. 25, (17 E. C. L. R.)

(n) *Isaac v. Gompertz*, MS. Lord Ch. 16th June, 1837.

But it is not necessary that the declaration should express, *totidem verbis*, a genealogical fact. It may be couched in language which amounts to the same thing: thus, if it speaks of the rights and benefits to which the party would be entitled by virtue of his birth or relationship, it will be admissible, though it do not expressly allude to such relationship. In *Isaac v. Gompertz*, declarations by his mother, that Henry would have the property, that he would be a gentleman, were admitted by Gurney, B., in evidence of his legitimacy, and were treated as evidence by the Lord Chancellor, if they had been freed from the objection of *lis mota*.

It is observable that in the case of *Annesley v. Earl of Anglesea*, hearsay evidence proceeding from persons, who, though not relations, had the best opportunities of knowing the facts of which they spoke, were in two instances rejected. It was a material question in that case whether Lady Altham ever had a child. The declaration of a midwife, that she had delivered Lady Altham of a child, and the declaration of a deceased lady, that she had stood godmother to the child of Lord Altham, were offered in evidence, and rejected. (o) The grounds of rejection in the first of these instances are not stated; but from the arguments and judgment on the second, it would seem that the evidence was considered as subject to the general rules, and the exception in favour of questions of pedigree was not noticed. Both declarations were in truth not so much assertions, touching directly a matter of pedigree as statements of particular facts, from which a matter of pedigree was to be inferred.

[ \*652 ] The place of birth is not a matter of pedigree, so as to be \*proved by hearsay evidence. In a settlement case, where the question was, whether the father's declaration of the place of birth of his illegitimate child were competent evidence of that fact, Lord Ellenborough, C. J., said, the only doubt which had been introduced into the case, had arisen from improperly considering it as a question of pedigree; the controversy was not, as in a case of pedigree, from what parents the child had derived its birth, but in what place an undisputed birth, derived from known and acknowledged parents, had happened. The point thus stated, turned on a simple fact, involving no question but of locality; and, therefore, not falling within the principle of, or governed by the rules applicable to cases of pedigree; and was to be proved, therefore, as other facts generally are proved, according to the ordinary course of the common law, that is, by evidence, to which the objection of hearsay did not apply. (p) It is observable, that here, not only the particular point in issue was not a matter of pedigree, but the case itself did not raise a question of that nature; and if, the distinction pointed out by Park, J., in *Whittuck v. Waters*, is to be considered universally applicable, that would have been a sufficient ground for rejecting the evidence.

In an action for use and occupation, under a lease for lives, the defence was, that the *cestuis que vie* had died before the time from which the claim was made. The evidence as to the death of one of the *cestuis que vie*, was merely, that the witness had heard in the family that the person was dead. Mr. J. Park said, "That will not

(o) 17 How. St. Tr. 1156, 1160.

(p) *Rex v. Erith*, 6 East, 539.

do. This is not a question of pedigree, when hearsay in the family is admissible;" and the evidence was rejected.(q)

The law having, from necessity, admitted in matters of pedigree, an exception to the rule which excludes hearsay evidence, has yet guarded this exception by two rules, viz., 1. That the hearsay allowed, shall be that only which proceeds from relations. 2. That hearsay shall not be received which originated under circumstances likely to bias those from whom it is derived. The latter rule is [ \*653 ] expressed in the terms, that a declaration made *post litem motam* is not receivable.

The value of hearsay evidence, must, of course, mainly depend upon the knowledge which the declarant must be supposed to have possessed, of the facts spoken to. It seems doubtful, when it was first considered, that some kind of connexion, from which such knowledge might be presumed, must have subsisted between the party making the declaration, and those to whom it referred. At first, no such connection appears to have been deemed necessary; and the general reputation, or traditions, existing in the country or neighbourhood, were considered admissible evidence, even of particular facts of descent or relationship. Thus, the general reputation of the country, that a certain boy was the legitimate son of Lord Altham, was allowed to be given in evidence in the case of *Annesley v. Earl of Anglesea*.(r) So also in the *Huntingdon Peerage* case, the Attorney-General admitted evidence of the general reputation in the county of Leicester, that the uncle of the petitioner would be entitled to the earldom of Huntingdon, on failure of issue of the late earl.(s) The expression of Lord Mansfield, that "tradition is sufficient in points of pedigree,"(t) would seem to imply, that at that time, no stricter rule had been established. But according to Lord Eldon, the doctrine of Lord Mansfield must be understood in a more limited sense than his words would imply. "I accede," said he,(u) "to the doctrine of Lord Mansfield, as it has been stated from Cowper; but it must be understood, as it has been practised and acted upon, and one word in that passage wants explanation. It was not the opinion of Lord Mansfield, or of any judge, [ \*654 ] that tradition \*generally is evidence, even of pedigree; the tradition must be from persons having such a connection with the party to whom it relates, that it is natural and likely, from their domestic habits and connections, that they are speaking the truth, and that they could not be mistaken." From these expressions of Lord Eldon, it may be collected, that it had already become the practice to require that some connection, from which knowledge might be presumed, should be shewn to have subsisted between the parties.

(q) *Whittuck v. Waters*, 4 Car. & Pay. 375, (19 E. C. L. R.)

(r) Before the Barons of the Exchequer in Ireland, A. D. 1743, How. St. Tr. 17, 1195.

(s) Attorney-General's Rep. *Huntingdon Earldom*, 359. See also 2 W. Bl. 1099; 14 East, 330. It is the practice in Scotland to admit evidence of genealogical reputation in matters of pedigree. Thus, in the proceedings in a cause, where the legitimacy was disputed, a witness, a relation of the parties, deposed that it was the general belief of the country that the claimant was lawful heir male and lineal descendant, "and that he is habite and repute as such." Min. of Ev. *Election of Scotch Peerage*, 1790, p. 136. In the *Caithness* claim, a witness, not a relation, was allowed to speak as to the time of birth of the ancestors of the claimant, and whether they had issue. *Ibid.* p. 171. See *Stair*, Inst. lib. 4, tom. 42, sec. 16.

(t) *Doe v. Moss*, Cowp. 594.

(u) *White Locke v. Baker*, 13 Ves. 514.

The nature of the requisite connection continued for some time undefined. Upon several occasions at *nisi prius*, the declarations of servants, physicians, and intimate friends, were admitted;(v) and this practice received some countenance from *obiter dicta* of Mr. Justice Buller, Lord Kenyon, and other judges.(w)

At a later period, Lord Eldon said he conceived that the question, whether a physician, or a servant who had attended the family could be admitted, had not been decided.(x) Abbott, C. J., in the case of *Beer v. Ward*, received the declarations of servants and acquaintances; but he did so, subject to a further discussion of the question, and expressing at the same time an opinion against their admissibility.(y)

But, although prior to the case of *Johnson v. Lawson*, the rule confining the admissibility of declarations to those of relatives is no where expressly stated, it seems, from the expressions of some of the judges there, that they considered it even then established.(z) In that case, Graham, B. refused to receive declarations of a deceased housekeeper, that a person under whom the plaintiff claimed, was the heir of her master; and he stated, that De Grey, C. J., had laid it down, that hearsay evidence must be confined to persons who are members of the family. Upon a motion for a new trial, the Court of Common Pleas were [ \*655 ] unanimous in thinking the evidence properly rejected. Best, C. J., in \*delivering judgment, after observing that hearsay evidence must be subject to some limits, said, "The rule applicable to such evidence, and the limitation hitherto pursued, has been to confine it to the declarations of relations, and members of the family, connected by blood or affinity, and to no others." And after making observations upon the circumstances under which, in the case of *Beer v. Ward*, declarations had been received, as shewing that that case could not be considered as establishing a different principle, he said, that the principal cases which had been decided on the subject, were all confirmatory of the rule which confined the declarations to be admitted, to those of kindred or members of a family.(a) Mr. J. Park, also in the same case spoke of it as a known and definite rule which ought to be adhered to.(b)

In a subsequent case, the dying declaration of a servant of a family, upon matter of family pedigree, was rejected.(c) In *Crease v. Barrett*,(d) Parke, B., in delivering the judgment of the court, cited *Johnson v. Lawson*, as an authority for saying, that in cases of pedigree, hearsay must be derived from relatives by blood, or from the husband, with respect to his wife's relationship; and that it was not admissible if it proceeded from servants or friends. "The line," he observed, "was clearly defined in this description of hearsay evidence." The same rule has been observed by the House of Lords in claims of peerage.(e)

(v) See the cases cited in 9 Moo. 187, 192.

(w) See *Rex v. Eriswell*, 3 T. R. 719. *Weeks v. Sparks*, 1 M. & S. 679, (23 E. C. L. R.) (x) *Walker v. Wingfield*, 18 Ves. 446.

(y) Printed Report of trial, second issue, pp. 189, 192. See observations of Best, Ch. J., on this case, in *Johnson v. Lawson*, 9 Moo. 188.

(z) 2 Bing. 86, (9 E. C. L. R.); 9 Moo. 183, (17 E. C. L. R.)

(a) Page 189.

(b) Page 194.

(c) *Doe d. Sutton v. Ridgway*, 4 B. & Ald. 53, (6 E. C. L. R.)

(d) 1 Cr., M. & R. 928.

(e) *Claim of R. C. Cooke to Barony of Stafford*, 1825. Min. Ev. p. 4.

On a question of legitimacy, depending upon the validity of a marriage, Lord Kenyon admitted evidence of a declaration by the clergyman, that a friend of the wife had forbidden the banns; he considered the declaration admissible, as being a confession by the clergyman that he had married without banns, by making which confession, he had put himself in a dangerous situation.(f) And a clergyman's declaration, as to the fact of marriage, when it was not against his interest, has been held inadmissible.(g)

\*The case of *Higham v. Ridgway*, cannot be considered as an authority for admitting declarations of persons [ \*656 ] not relatives, on the footing of hearsay. There, an entry made by an accoucheur in his book, of having delivered a woman of a child on a certain day, the charge for which was marked "paid," was considered admissible as evidence of the birth of the child on that day, on the trial of an issue as to his age at the time of his afterwards suffering a recovery.(h) The principle on which that case was decided was, that it was a statement against the interest of the party making it; (i) none of the judges put it on the ground of pedigree.(j) Lord Ellenborough, C. J., expressly stated, that "his opinion was not formed with reference to the declarations of parents, received in evidence, as to the birth, or time of the birth of their children."(k)

In the case of *Annesley v. Earl of Anglesea*, cited in a former page, it has been seen that the declaration of a midwife, that she had delivered Lady Altham of a child, was rejected.(l)

The rule is now well established, that hearsay evidence, on matters of pedigree, to be admissible, must proceed from some member of the family to which it relates; and the declarations of an illegitimate member of the family have been held inadmissible.(m) The publicity of instruments of pedigree, however, will sometimes be held to supply defect of proof as to their origin. For, if from their place of deposit, such instruments must be presumed to have been known to members of the family, the fact of their remaining uncontradicted, is, in effect, an acknowledgment by the family of the truth of the statements contained in them; and such an acknowledgment is obviously equivalent to an original assertion of the same facts.

Perhaps a sufficient reason for limiting the admission of hearsay to the declarations of relatives, may be found in the necessity of drawing some line, and the certainty and intelligibility of the rule afforded by that limitation. [ \*657 ] (n) An additional reason may, however, be advanced in the probability that a relative would have more accurate knowledge on such points than a stranger. Lord Erskine pointed out this principle in the case of *Vowles v. Young*.(o)

(f) *Standen v. Standen*, 1 Peake, N. P. C. 47, 3rd ed.

(g) *Berkeley Earldom*, Printed Min. Ev. 1811, p. 655. See *Robins v. Wolseley*, 2 Cas. temp. Lee, 35. 475.

(h) 10 East, 109.

(i) Per Bayley, B., 1 Cr. & J. 458.

(j) Per Lyndhurst, C. B., *ibid.* 456.

(k) 10 East, 117. See also as to the case of *Higham v. Ridgway*, per Bayley and Vaughan, BB.'s.; *Gleadow v. Atkin*, 1 Cr. & M. 422.

(l) 17 How. St. Tr. p. 1157, sup. p. 651.

(m) *Doe d. Bamford v. Barton*, 2 Mo. & Rob. 28.

(n) See per Ch. J., *Best*, 9 Moo. 186, (17 E. C. L. R.)

(o) 13 Ves. 140.

where he observed, that the hearsay of relations was evidence, from the interest of those persons in knowing the connections of the family.

It seems to be chiefly on this principle that declarations of a husband, respecting the legitimacy, or descent of his wife, are admissible; for, though not related to the wife by blood, the husband, as was remarked by Lord Erskine, (p) has a strong interest in knowing her legitimacy, on account of the rights which her succession to real or personal estate might confer on him.

The connection of marriage is sufficient to render admissible declarations of the party so connected respecting the family. (q) And it is not necessary, in such cases, to shew that the information was obtained by the declarant during the continuance of the marriage. An objection to the declaration of a husband as to his wife's legitimacy, made after her death, when, as was contended, his connection with her family had ceased, was overruled by Lord Erskine, on the ground, that his knowledge must have been acquired whilst he was a member of the family. (r) Perhaps it might have been not improperly considered, that the connection of marriage is not dissolved by the death of either party. This was held in a recent case before the Privy Council. (s)

It appears that hearsay, in the second degree, or declarations upon [ \*658 ] declarations, may be admitted. It is true, that in the case \*of *Johnson v. Lawson*, Best, C. J., said, that double hearsay, or declarations upon declarations, had never yet been received as evidence in Westminster Hall, although made by members of the family; (t) but this observation was probably intended to apply only to cases where one of the declarants was a stranger, which was the fact in the case (u) with reference to which the observation was made. In the subsequent case of *Doe v. Randall*, (v) the same learned judge expressly assented to the admissibility of such hearsay, where both declarants were members of the family. In that case, he said, "If a party, on cross-examination, was questioned as to declarations made by a person deceased, although he did not hear them himself, it would be sufficient for him to state that he had heard his relations (that is, relations of the deceased,) say that the deceased declared who and what his cousins or other relatives were."

In *Monkton v. Attorney-General*, (w) the Lord Chancellor treated it as clear, that there is no distinction to be taken between declarations made by a relative from his own personal knowledge, and declarations made by him, as to what he had heard from others. His lordship observed, that such declarations are most frequently founded upon what the declarant has heard from others to whom he gave credit. So

(p) 13 Ves. 147.

(q) *Doe d. Northey v. Harvey*, 1 Ry. & Moo. 297, (21 E. C. L. R.) *Doe d. Futter v. Randall*, 2 Moo. & P. 20, (17 E. C. L. R.) *Airth Earldom*, Min. Ev. 116.

(r) In *Vowles v. Young*, per Burrough, J., 9 Moo. 194.

(s) *Becquet v. Godfray*, 1 Knapp, P. C. C. 376, where the question was, whether a husband, whose wife had died, could act as a judge in a cause in which her nephew was a party, which, by the law of the land, (the Island of Jersey), he could not have done during her life.

(t) 9 Moo. 190, (17 E. C. L. R.)

(u) *Brown v. Shelley*, cited by Buller, J., in *Rex v. Eriswell*, 3 T. R. 719, and in *Johnson v. Lawson*.

(v) 2 Moo. & Pay. 20, (17 E. C. L. R.)

(w) 2 Russ. & My. 165.

in *Slaney v. Wade*, Lord Cottenham, C., observed, that in cases of declarations, it is not supposed that the party is speaking from his own knowledge, but from what he has heard as a member of the family.(x)

Besides the declarations of particular relations, the general reputation of the family is sometimes admitted upon questions of pedigree. In *Doe d. Banning v. Griffin*, in order to prove a person to have died unmarried, a relative was allowed to state that, according to the repute of the family, he had died in the West Indies, and that she had never heard in the family of his being married.(y) It has been observed, that the common reputation, or belief of the family, gives credit to hearsay evidence.(z) \*It has been thought that [ \*659 ] general reputation, in matters of pedigree, may be proved by the evidence of strangers; but there does not appear to be any sufficient authority for excepting evidence of this description from the rule that excludes declarations not made by relatives.

It is not necessary that the hearsay evidence, which is admitted upon questions of pedigree, should be contemporaneous with the events to which it relates. Such a restriction would completely defeat the purpose for which hearsay in pedigree is let in, by preventing it from ever going back beyond the lifetime of the person whose declaration is to be adduced in evidence.(a) In the *Lovat Peerage* case, a witness was allowed to prove what she had heard her mother say as to the state of the family six generations back.(b)

Before the declaration of a relative can be admitted in evidence, his relationship with the family must be proved *aliunde*;(c) that is, it must be established by extrinsic proof, or evidence *dehors* the declarations,(d) and not out of the declaration itself. Thus in the *Banbury Peerage* case the judges held, upon a question put to them by the House of Lords, that a bill in chancery, purporting to be filed by the next friend of an infant, such next friend therein styling himself the uncle of the infant, and depositions in the same cause made by persons styling themselves relatives of the family, were not evidence that the parties respectively sustained those characters, so as to let in such bill and depositions on the footing of declarations, in a case where the legitimacy of the infant was in question.(e) In the *Leigh Peerage* case it was held that the relationship between the family and the party whose declaration was tendered in evidence, must be proved on oath, before the declaration could be admitted.(f) Perhaps in proving ancient pedigrees this rule might be considered too exclusive, as the \*relationship of the declarant with the family is often a [ \*660 ] fact of equal antiquity, and equally difficult of proof, with the relationship which is the subject of the declaration. In the *Stafford* case the counsel were informed that hearsay was not evidence, unless it could be proved that the person making the declaration was

(x) 1 My. & Cr. 355.

(y) 15 East, 294.

(z) Bull. N. P. 295.

(a) *Monkton v. Attorney-General*, 2 Russ. & My. 157. And see *Kidney v. Cockburn*, *ibid.* 170.

(b) *Min. Ev.* p. 89. And see *Hood v. Lady Beauchamp*, 8 Sim. 26.

(c) See per Lord Eldon, C. *Walker v. Wingfield*, 18 Ves. 446.

(d) Per Lord Brougham, C., *Monkton v. Attorney-General*, 2 Russ. & Myl. 156.

(e) 2 Selw. N. P. 754. Per Lord Eldon, in the *Berkley* case, 4 Camp. 419.

(f) *Leigh Baroncy*, *Min. Ev.* 1839, p. 307.



acknowledged by some of the known relatives.(g) It is clear that a mere claim of relationship by the person making the declaration is not sufficient. That would in effect be "to allow a party to claim an alliance with a family by the bare assertion of it.(h)

It is sufficient that the declarant be connected by extrinsic evidence with one branch of the family touching which his declaration is tendered. To require proof of his connection with both branches would be to render the declaration itself superfluous, as the very fact in proof of which it is used would then be established.(i)

Hearsay evidence is of course inadmissible if the person making the declaration is alive, and can be called.(j) But the declarations of a deceased mother as to the time of the birth of her son are admissible, though the father is living and is not called.(k)

As the law has endeavoured to secure accurate knowledge in the witnesses whose declarations are to be receivable at second hand, by admitting only such as from their connections are most likely to be well acquainted with the facts, so it has been careful to guard this evidence from the danger of intentional incorrectness, by requiring reasonable security for the absence of all bias from the minds of the witnesses. With this view the second rule above stated has been established, that declarations made *post litem motam* are not admissible.

[ \*661 ] This rule appears not to have been established with any \*precision, or to have been much considered, before the present century.(l) The objection to admitting declarations made after the state of things had arisen upon which the contest was, "when there was a discourse about the matter," seems to have prevailed in an old case, before Reynolds, C. B., although it appears that declarations made "when there was no prospect of a controversy" were allowed.(m)

The next case is that of *Hayward v. Firmin*,(n) before Lord Camden, in which, according to Mansfield, C. J.,(o) on a question of the legitimacy of the son, the declarations of the mother as to her marriage, made after the commencement of the suit, were received after objection taken, and debate had; but not a word appears to have been said of the prior decision of Lord C. B. Reynolds. In *Goodright v. Moss*,(p) the objection to the answer that it was *post litem motam* does not seem to have been taken: and upon examination it will be found, that the new trial was granted on the ground, that the general declarations of the father and mother had been rejected. It does not appear that there is any other authority upon the subject in our law,(q) prior to that of the *Berkeley*

(g) *Stafford Barony*, 1825, Min. Ev. p. 5.

(h) Per Best, Ch. J., *Doe d. Futter v. Randall*. *Davies v. Morgan*, 1 Cr. & J. 591, and *Adamthwaite v. Synges*, 1 Stark. N. P. C. 183, shew that the character and custody of records must be proved by extrinsic evidence. In the former case, Bayley, B., referred to the *Banbury* and *Berkeley* cases. See also per Bayley, J., in *Rex v. All Saints*, 7 B. & C. 788, (14 E. C. L. R.)

(i) Per Brougham, C., 2 Russ. & My. 157.

(j) *Pendrell v. Pendrell*, 2 Str. 924.

(k) *Rex v. Birmingham*, MS.

(l) *Graham, B.* who differed from the rest of the judges as to the first question in the *Berkeley* case, disclaimed any knowledge of the rule.

(m) *Viner's Ab. Ev.* T. b. 91.

(n) Cited by Lawrence, J., in the *Berkeley* case, 4 Campb. 410.

(o) *Ibid.* 417.

(p) *Cowp.* 594.

(q) In the *Douglas* case, it appeared that the *status* of the defender and his brother had been disputed from a period very soon after their birth, and that proceedings had been taken

Peerage case, unless that of *Edwards v. Harvey*(r) can be considered such. There, upon the trial of an issue, a M.S. pedigree drawn out by, and found among the papers of a deceased relative was rejected: but it is not clear whether it was rejected upon the ground that it had been made after the doubts had arisen as to the pedigree, or because the person who made it had herself an interest in establishing the relationship. It may be observed, however, that Mr. B. Graham, who rejected that evidence, was the only one of the Judges who in the Berkeley Peerage case disclaimed any knowledge of the rule in question.

\*In the Berkeley Peerage case the particular time at [ \*662 ] which declarations were made was considered with respect to their admissibility.(s) To explain the question submitted to the Judges, it is only necessary to state that William Fitzhardinge Berkeley, the claimant, was born on the 26th of December 1786, and that he alleged that his father and mother were married in the parish of Berkeley in the county of Gloucester, on the 30th of March 1785. They were likewise married in the parish of St. Mary Lambeth, on the 16th of May 1796, till which time Lady Berkeley did not appear as his Lordship's wife; and the claimant was not till some time after treated as their legitimate son. They had several children after the second marriage. The only question before the Lords respected the legitimacy of the claimant; and that depended entirely upon the reality of the first marriage alleged to have taken place between his parents.

In the year 1799, a bill was filed in the Court of Chancery by the claimant, and three of his brothers born before the second marriage, to perpetuate the testimony of their legitimacy, on the ground that they were entitled, in remainder in tail after an estate for life, to certain lands then held by their father: the children born after the second marriage, and others entitled in remainder after them being made the defendants.(t)

The Earl of Berkeley was one of the witnesses examined on interrogatories for the plaintiffs, and in his deposition he swore positively to the reality of the first marriage, and the plaintiffs' legitimacy. The counsel for the claimant, after a large body of other evidence adduced before the Committee of Privileges, now proposed to read this deposition, as a declaration by the late Earl of Berkeley in a matter of pedigree, respecting the legitimacy of his son. The admissibility of this deposition was opposed on the part of the Crown, and the eldest son after the second marriage.

Thereupon the Judges were summoned, and the following with other questions, submitted by the House of Lords to their consideration.

\*1. Upon the trial of an ejectment respecting Black [ \*663 ] Acre between A. and B., in which it was necessary for A. to prove that he was the legitimate son of I. S., A., after proving by other evidence that I. S. was his reputed father, offered to give in

to prove them illegitimate; yet the dying declaration of Lady Jane Douglas, and the declaration of Sir John Stewart subsequently to this, were received without objection. But that case was tried by the law of Scotland, by which, as before noticed, great latitude is allowed in the admission of hearsay evidence.

(r) Cooper, Ch. Ca. 39.

(s) Berkeley Earldom, May 13, 1811, 4 Campb. 401.

(t) See Lord Darley v. Fitzhardinge, 6 Ves. 251.

evidence a deposition made by I. S. in a cause in Chancery instituted by A. against C. D., in order to perpetuate testimony to the alleged fact disputed by C. D., that he was the legitimate son of I. S., in which character he claimed an estate in remainder in White Acre, which was also claimed in remainder by C. D. B., the defendant in the ejectment, did not claim Black Acre under either A. or C. D., the plaintiff and defendant in the Chancery suit. According to law, could the deposition of I. S. be received upon the trial of such ejectment against B. as evidence of declarations of I. S., the alleged father, in matters of pedigree?

The Judges who were present, to the number of seven, delivered their opinions at length: and with one exception pronounced the deposition of I. S. inadmissible. The ground of inadmissibility mainly relied on was, that it had been made *post litem motam*. The rule therefore must be considered as thoroughly established by that case.

It becomes then material to ascertain the precise meaning of the term *lis mota* in the rule in question, for which purpose a consideration of the principles on which the rule is founded will not be unimportant.

In the case of *Whitelock v. Baker*, Lord Eldon, after mentioning various forms of traditional evidence, said, they are all admitted upon the principle that they are the natural effusion of a party, who speaks upon an occasion, when his mind is in an even position, without any temptation to exceed, or fall short of the truth.<sup>(u)</sup> These expressions are referred to by more than one of the Judges in the *Berkeley Peerage* case, as containing the principle of the rule in question.

Mr. Baron Wood, after quoting the words of Lord Eldon, said: [ \*664 ] "Upon this principle it has been the general rule, as far back as my experience and knowledge go, to reject hearsay evidence of the declarations of deceased persons, not only relative to matters in actual suit, but in dispute and controversy, prior to the commencement of judicial proceedings."<sup>(v)</sup> Mr. J. Lawrence also adopted the principle, and almost the language, of Lord Eldon, and then went on to say,<sup>(w)</sup> "The receiving of these declarations, therefore, though made without the sanction of an oath, and without any opportunity of cross-examination, may not be attended with such mischief as the rejection of such evidence, which, in matters of pedigree, would often be the rejection of all the evidence that could be offered. But mischievous indeed would be the consequences of receiving an *ex parte* statement of a deceased witness, although upon oath, procured by the party who would take advantage of it, and delivered under that bias which may naturally operate on the mind, in the course of a controversy upon the subject." He then observed, that declarations in cases of pedigree stood on the same footing as cases of prescription, where what a witness had heard after the beginning of a controversy, was never admitted; and after stating that the authorities were balanced, he said, resort must be had to principle, and the uniform practice which had obtained in questions of prescription. "Can it be presumed that a man stands perfectly indifferent upon an existing dispute respecting his kindred? His declarations *post litem motam*, not merely after the commencement of the law-suit, but *after the dis-*

(u) 13 Ves. 514.

(v) 4 Campb. 406.

(w) *Ibid.* 409.

*pute has arisen*, (that is the primary meaning of the word *his*), are evidently more likely to mislead the jury, than to direct them to a right conclusion, and therefore ought not to be received in evidence."

The meaning then of the term *post litem motam* is here explained to be *after the dispute has arisen*. Lord Chief Justice Mansfield, in the Berkeley Peerage case, said, "The line of distinction is the *origin of the controversy*, and not the *commencement of the suit*. After the controversy has originated, all declarations are to be excluded, whether it was or was not known to the witness. If an inquiry were to be instituted in each instance, whether the \*existence of the [ \*665 ] controversy was or was not known at the time of the declaration, much time would be wasted and great confusion would be produced.(x)

A subsequent case has gone yet further in defining what is the commencement of the controversy. Where a person died possessed of property, which many years afterwards another person commenced a suit to recover, and in the year after the first person's death, a relation of the second person made a declaration, the effect of which was to prove that he was the heir and next of kin of the first person, it was held that the second person could not avail himself of such a declaration in evidence. It was argued, that if the existence of a controversy were essential to the exclusion of the evidence, a party might lay by and make no controversy till he had got a sufficient body of such evidence: the evidence was rejected by Alderson, B., on the principle that the commencement of the controversy must be taken to be, the arising of that state of facts on which the claim is founded, without any thing more.(y)

So far the authorities agree with each other; but in the case of *Monkton v. Attorney-General*,(z) Lord Brougham expresses a different opinion. Speaking of a MS. pedigree, which was put in evidence as containing the declarations of a relative, his Lordship said, "bring it within the rule either of *Whitelock v. Baker*, or the *Berkeley Peerage* case: prove that it was made *post litem motam*, not meaning thereby a suit actually pending, but a controversy existing, and *that the person making or concocting the declaration took part in the controversy*: shew me even that there was a contemplation of legal proceedings, with a view to which the pedigree was manufactured, and I shall then hold that it comes within the rule which rejects evidence fabricated for a purpose, by a man who has an interest of his own to serve." It would seem, from this language, that Lord Brougham did not consider that it would be sufficient for the exclusion of the evidence, to show that the pedigree was prepared after the arising \*of the state [ \*666 ] of facts on which the claim was founded, but that he thought some knowledge of, and share in the controversy, must be brought home to the compiler.

In the *Berkeley* case, Graham, B., suggested that if it could be clearly shewn that the party making the declarations could not by possibility know that a suit was commenced or contemplated, surely the declarations would be receivable: and observed upon the field of

(x) 4 Campb. 417.

(y) *Walker v. Beauchamp*, 6 C. & P. 552, (25 E. C. L. R.)

(z) 2 Russ. & My. 147.

inquiry that would be opened in every case where hearsay evidence was tendered, if it was to be excluded where the declarant was shown to have had such knowledge. It is observable that C. J. Mansfield urged the same consequences, as a reason for not requiring any evidence of such knowledge.(a)

In *Slaney v. Wade*,(b) estates were devised to one for life, with limitations to his first and other sons in tail, with remainder to the right heirs of the testator. A copy of mural inscription, made by a member of the family after the death of the testator, but in the life of the tenant for life, who afterwards died at the age of fifty, without issue, was offered in evidence for the person who claimed as heir of the testator. It was objected to, as having been made after the state of facts arose which [ \*667 ] formed the \*ground of the suit. It was, however, admitted at law; and on a motion for a new trial, the Lord Chancellor considered it admissible. He said it would be going far beyond any other case to hold, that at the time the copy was made, there was a *lis mota*.(c)

In a still more recent case, the state of facts not having arisen when declarations were made, the actual existence of a suit at that time seems to have been considered by one learned Judge insufficient to render the declarations inadmissible. In *Ansdell v. Gompertz*, the question was whether Henry, the son of Joseph Isaac, was born before or after the marriage of his parents in 1783. It appeared that a large sum of money stood limited, in the event of the death, without issue, of the tenant for life, to the first son of Joseph Isaac, who should attain twenty-one. A suit was instituted, in 1782, respecting this property, and was pending when declarations respecting the legitimacy of Henry were made. The tenant for life, however, was then alive, and on that ground the objection of *lis mota* did not prevail at law. But Lord Cottenham said he should have great difficulty in concurring with the Judge (Baron Gurney,) that declarations were admissible, if made under these circumstances.

In the claim of Robert Barclay Allardice to the Earldom of Airth, part of the evidence tendered by the petitioner, to show the extinction of one branch of the family, was a paper, entitled "a narrative of the family of Airth and Monteith." It was in the handwriting of one John Bogle, who had married a descendant of the last Earl of Airth, and was by him prepared and transmitted to his son, with a view to induce

(a) Amongst the civilians, the general rule was, that hearsay originating *post litem motam* was inadmissible; but to this rule there was an exception, apparently founded on the presumed ignorance of the *lis mota* on the part of the declarant, namely, that if the witness proved that he heard the fact in a place very far distant from the scene of controversy, his evidence was to be admitted. The rule and exception are thus stated in *Mascardus de Probationibus*, (probably the book referred to by Ch. J. Mansfield, (4 Campb. 417,) as a treatise of great learning, entitled "De Probationibus.") "Nec vero tantummodo debent esse personæ graves, sed etiam debent deponere se audivisse ea quæ asserunt, ante litem motam; quod si post litem motam deponent, non solum non probant, sed nec ullam fidem facerent; quia facile contingere potest, ut quis—piam id audiverit ab alio, qui illud protulit in fraudem, vel quod lis ipsi mota traxerit istam famam." "Istud autem quod diximus, debere testes deponere ante litem motam, sic est accipiendum ut verum sit, si ibidem, ubi res agitur, audierit; at si alibi in loco, qui longissime distaret, sic intellexerit, etiam post litem motam, testes de auditu admittuntur. Longiquitas enim loci in causa est, ut omnis suspicio abesse videatur, quæ quidem suspicio adesse potest, quando testis de auditu post litem motam ibidem, ubi res agitur, deponit." *Masc. Conclua.* 420, n. 4, 5,

(b) 1 My. & Cr. 338.

(c) 1 My. & Cr. 356.

him to claim the peerage, which however he never did. The petitioner claimed through an elder branch. The evidence was objected to, on the ground that at the time when the document was prepared, there was a controversy in the family, as to who would be entitled to the dignity, and letters were produced, showing that the claim had been the subject of discussion. The Committee for Privileges, however, considered, that as the document was a pedigree transmitted by a father to his son, in order to induce him to make a claim [ \*668 ] to \*peerage, it was natural to suppose that the information was correct: and the son not having been induced to make the claim, it did not come within the exception of *lis pendens*.(d)

The House of Lords have admitted evidence in the nature of declarations, which originated after a claim had been actually made by a person to whom the declarant was heir. A *retour* of service, dated in 1805, shewing the descent of Mary Bogle, was tendered as a declaration: it was objected to, on the ground that there had been a dispute in the time of Mrs. Bogle's uncle, whether he was or was not Earl of Monteith; and that as she was his heir, there was a sufficient *lis pendens* to exclude the evidence. The counsel were informed that the only ground on which the evidence could be rejected was, that there was a *lis mota*; that the only evidence upon that was the claim made by her uncle in his lifetime; that he had died in 1783, and there was no trace of any claim, or intention to prosecute a claim, by any member of the family after that period; that if that claim having once existed, could be considered as sufficient to exclude evidence, it would go to the rejection of evidence in almost all cases.(e)

It should be noticed that in the case last cited, the pedigree which was received after objection, was not compiled with a view to support any claim that the compiler himself could ever have put forward. This distinguishes the case from another modern case, where a MS. pedigree was considered inadmissible, because it was not a spontaneous effusion, but was made for a particular object, and in contemplation of litigation. In that case a pedigree found among the papers of the claimant's family in the hand-writing of the claimant's father, was tendered in evidence. It appeared that the pedigree had been compiled with a view to support a claim to certain estates. It was urged, in support of its admissibility, that the father could have no interest in the question then in agitation, as he never could have claimed the peerage, which the petitioner claimed through his mother; and that there had not been any proceedings instituted of which they had any knowledge. It was, however, considered that the evidence \*was inadmissible, as made in the prospect of a [ \*669 ] contest for property; and although it appeared that in the claim to the estates, the descent was admitted on both sides, their Lordships held that that fact made no difference, as it might be equally for the interest of each party to admit a particular fact, though contrary to the truth.(f)

It would seem, upon principle, that a *lis mota*, in order to have the effect of excluding declarations, must be upon the fact of heirship. No authority upon this point has been met with in our law; but the ques-

(d) Airth Earldom, Min. Ev. p. 116.

(e) Ibid. p. 99.

(f) Slane Baroncy, Min. Ev. 1830, pt. 1, p. 6; pt. 2, p. 35, and pt. 3, p. 6.

tion has occurred in the Courts of the United States. In a case where a controversy had arisen, or was expected to arise, concerning the validity of a deed, against which one of the parties to the principal suit claimed, but no controversy was then expected to arise about the heirship; a letter, written about that time, stating the pedigree of the claimants, was held not within the rule excluding declarations made *post litem motam*.(g)

A distinction has been taken in favour of declarations made with an express regard to the possibility of a future controversy, where the object of the declaration was to establish a fact, which might prevent the controversy arising. Lord Mansfield said, that he had known advice given to a father and mother to make attested declarations in writing, under their hand, of the precise time of the birth of the bastard *eigne*, and the subsequent marriage, to prevent controversy in the family touching the inheritance.(h) And his Lordship implied that such evidence would be admissible. The answer of the Judges to the third question, put to them in the Berkeley case, is more express to the same effect.(i) They said, "That writing in a bible, or any other book, or any other piece of paper, would be admissible in evidence, as a declaration of the father in matter of a pedigree, notwithstanding that the father was proved to have made such entry for the express [ \*670 ] purpose of establishing the legitimacy of his son, and the \*time of birth, in case the same should be called in question after the father's death. Its particularity would be a strong circumstance of suspicion, but still it would be receivable, whatever the credit would be to which it would be entitled."

The rule, and the principle of it have been thus stated. With reference to Lord Mansfield's language, it has been said, "It sanctions the doctrine, that the having a distinct object in view in making a declaration in writing, or by parol, even though the object can only be gained by afterwards using the declaration in evidence, is not sufficient *per se* to exclude that declaration. In plain terms, if a father or mother make a pedigree, for the purpose of preventing disputes in the family, his Lordship says he will admit that pedigree in evidence, even when those very disputes arise; because it was not made with a view to their own interest, but to preserve a *constat*, as it were, on record, of facts peculiarly within their knowledge, (which is one of the main grounds of admitting such hearsay declarations;) and the observation, that it was made for the purpose of settling family disputes, and may not have been so spontaneous and natural as some of the *dicta* of the Judges would seem to require, shall only go to its weight and credit with the jury, and shall not preclude its admission by the Court."(j) The opinions both of Lord Mansfield, and of the Judges in the Berkeley case, agree, that the credit due to such evidence is matter for the consideration of the jury.

There are one or two cases which seem to support the doctrine that the declarations of a person *in pari jure* with the person seeking to

(g) *Elliot v. Peirsol*, 1828, 1 Peters's Rep. (U. S.) 428.

(h) *Goodright v. Moss*, Cowp. 591.

(j) Per Lord Brougham, 2 Russ. & My. 164.

(i) 4 Campb. 416.

use them, are inadmissible.(k) Thus, in the claim of Sir Cecil Bishopp to the Barony of Zouche, some private papers, purporting to be the pedigree of Lord Zouche of Haryngworth, from the possession of a lady, since dead, who was a branch of the family, and conceived herself entitled to the dignity claimed by the petitioner, were rejected.(l) It seems probable, however, \*that the true ground of rejection was, that the pedigree had been compiled in contempt [ \*671 ] of a claim to the dignity.

On a motion in Chancery, for a new trial of an issue, the question was, whether a paper, offered to be produced as evidence on the part of the plaintiff, and which Mr. Baron Graham had rejected at the trial, ought to have been received as evidence. It was a pedigree drawn out by Bridget Lloyd, a maiden lady, deceased, shewing that C. D., who was her relation, was related to A. B. It was made after the doubts arose as to the pedigree, but she herself was dead, and it was found amongst her papers. It is stated in the report, that the Master of the Rolls (Sir W. Grant,) refused a new trial, because, if Mrs. Bridget Lloyd's pedigree, written by herself, were evidence for her relation, so would her declaration have been evidence to shew that she was herself entitled to the estate.(m) Here, also, it may be doubted, whether the real ground of the decision was not rather the time at which the pedigree was made.

It is now, however, perfectly settled, both upon reason and authority, that hearsay evidence is not to be excluded, on account of the bias supposed to operate on the person making the declaration, in consequence of his being, or believing himself to be in the same situation touching the matter in contest, with the party relying upon that declaration.(n)

It is not necessary that the declaration should distinctly express *totidem verbis* the particular fact in evidence of which it is adduced; expressions equivalent, as assertions inconsistent with the existence of any other state of facts, will be sufficient. This subject will be more fully considered in discussing the various forms under which hearsay evidence may be presented.(o)

It is, lastly, necessary to treat of various forms under which hearsay evidence, in matters of pedigree, may be presented. [ \*672 ] \*The original statement may have been made orally, and [ \*672 ] may be proved by the testimony of those who heard it, in which case, it is strictly what Lord Mansfield speaks of as "*tradition*;" or, which is much more frequently the case, it may have been made in writing, and will then depend upon the production of the instrument containing it, or secondary evidence of its contents. In traditional hearsay, the author of the statement is known, and the evidence is received upon the credit which is given to him; and the same observation will apply to some forms of written hearsay; but as has been noticed in a former

(k) In Drummond's case, 1 Leach, Cr. C. 578, the evidence was clearly inadmissible upon other grounds than the situation of the party making the declaration. See per Lord Brougham, C. 2 Russ. & My. 160. (l) Zouche of Haryngworth Barony, 1804, Min. Ev. p. 207.

(m) Edwards v. Harvey, Cooper, Ch. Rep. 39.

(n) Per Lord Brougham, C. Monkton v. Attorney-General, 2 Russ. & My. 160.

(o) See Kellie Earldom, cited sup. p. 205.



page, there are other forms of written hearsay, in which the author, being unknown, credit is nevertheless given to the statement, as having been acknowledged and adopted by persons interested to know and maintain the truth. Of the former kind, are statements contained in family letters, descriptions in wills, or recitals in deeds: of the latter, monumental inscriptions, engravings on rings, or pedigrees openly hung up in mansion-houses, may be cited as examples.

Entries in family bibles are among the most common forms of hearsay evidence of pedigree: but it is questionable to which of the above classes they more properly belong. C. J. Mansfield, in delivering the answer of the Judges to the second question in the Berkeley case, expressed an opinion, that an entry written by a father in a bible, would not be of more weight than the same written in any other book.(p) Lords Ellenborough and Redesdale, however, intimated that the use of the book as the ordinary register of families, and the access of the family to it, would give a degree of strength and solidity to the evidence, which would not be conceded to another document. The distinction between a family bible and other documents was carried further by Lord Brougham, who observed, that as a family acknowledgment, and on account of its publicity, such book would be admissible without proof that the entry was made by a member of the family.(q)

[ \*673 ] In *Johnstone v. Parker*, an entry in a family bible was used to \*shew that a man was under age at the time of his marriage by license.(r) It does not appear that it was proved by whom the entry was made. It should be noticed, that whatever difference of opinion existed between the Judges, and the Law Lords in the case above cited, referred, not to the admissibility, but to the comparative value of the supposed entry. Nor is it to be collected that the book, as a bible, was considered to be entitled to any distinct admissibility or credit. For there is no ground for a notion, which seems sometimes to have existed, that the character of a book as a religious work, may affect the admissibility of genealogical memorandums made in it.(s)

It has been seen, that an almanac has been admitted to prove by an entry made therein in the handwriting of the father, the date of his son's birth.(t) So an old book, from the library of Lord Oxford, mentioning the pedigree of William Zouch, signed by himself, is stated to have been received.(u)

On the other hand, in a recent case, where an entry in a prayer-book, alleged to have belonged to a member of the family, was tendered in evidence, without any proof by whom the entry relied on was made, it was rejected.(v)

A missal, containing numerous entries, made by a father, of births, deaths; and marriages of his children, was received by the House of Lords apparently without difficulty.(w)

Correspondence between members of the family, addressing each

(p) *Campb.* 421.

(q) *Monkton v. Attorney-General*, 2 Russ. & My. 162.

(r) 3 Phill. 62, (1 Ecc. R.)

(s) See *Hood v. Lady Beauchamp*, cited post, p. 637.

(t) *Herbert v. Tuckall*, Sir T. Raym. 84.

(u) *Vin. Ab. Ev. T. b.* 87, pl. 5, *Guildford Lent Assizes*, 5 Geo. 1.

(v) *Tracy Barony*, 1843. See *Hood v. Lady Beauchamp*, cited post, p. 637.

(w) *Slane Barony*, 1831, *Min. Ev.* pt. 2, p. 49.

other as relatives, and making statements of pedigree, have been frequently admitted. In *Kidney v. Cockburn*, a letter was put in evidence to prove the age of the writer's grandfather at the time of his death.(x) So in the *Huntingdon Peerage* case, a letter was put in evidence from the Countess of Moira, sister of the tenth Earl of Huntingdon, to Archdeacon Hastings, in which \*she [ \*674 ] enters into a very extensive detail of the pedigree of her family, which was found to correspond with the other evidence laid before the Attorney-General. In this letter she also states her belief, that the claim to the title was with the family of the petitioner.(y)

In a recent case, a letter-book in the possession of the executor of the Earl of Marchmont, being tendered in evidence before the Committee of Privileges, as containing declarations relating to the family, it was required to be shown that the letters were those of Lord Marchmont. Afterwards, a witness deposing that he had examined the handwriting of Lord Marchmont on the Records of the Scotch Parliament, and made himself well acquainted with it, and that some of the letters in the book were written, and others corrected in the same writing, the book was received.(x) Numerous other cases may be referred to.(a)

The contents of deeds will often afford admissible evidence in the nature of declarations by members of the family.(b) Marriage settlements are particularly fruitful sources of information as to descent. Various steps in the pedigree of the Courtney family were proved by their descriptions in documents of this nature.(c) Deeds to lead the uses of a fine,(d) or a recovery,(e) indentures of apprenticeship,(f) contracts of marriage,(g) marriage articles,(h) family settlements,(i) and other deeds have been admitted.

\*Evidence of this nature is most frequently found in the recitals of deeds; but the description of parties will sometimes afford proof as to identity. Thus, to prove that Alexander Borthwick was at first described as of Johnstonburn, and afterwards of Gilchriston, an original indenture of apprenticeship of his son William Borthwick, to a surgeon in Edinburgh, in which Alexander bore the foregoing description, was produced in evidence from among the title deeds of the family.(k)

It follows from the principles upon which the admission of such evidence is founded, that if the deed was not executed by a member of the family to which the statements refer, the contents will not be

(x) 2 Russ. & My. 167.

(y) *Bell's Huntingdon Peer. case*, A. G. Rep. p. 357.

(z) *Marchmont Earldom*, Min. Ev. pp. 345. 353. See also *Airth Earldom*, Min. Ev. p. 105.

(e) *Berners Barony*; *Collins on Bar.* 355, 356. 361. *Leigh Barony*, Min. Ev. pt. 2, p. 140. *Hastings Barony*, Min. Ev. p. 196.

(b) *Neal d. D. of Athol v. Wilding*, 2 Str. 1151; *Chandos Barony*, Min. Ev. p. 27; *Stafford Barony*, Min. Ev. p. 110; *Zouche of Haryngworth Barony*, Min. Ev. 1804, p. 275; *Lisle Barony*, pp. 116. 127; *Banbury Earldom*, pp. 6. 117.

(c) *Devon Earldom*, by *Nicolas*, 1832, App. pp. 44. 46.

(d) *Hastings Barony*, Min. Ev. p. 200.

(e) *Marmyon Barony*, Min. Ev. p. 111.

(f) *Borthwick Barony*, Min. Ev. p. 62.

(g) *Huntly Marquisate*, Min. Ev. p. 15.

(h) *Roscommon Earldom*, Min. Ev. p. 36. In this case, the Lords held that marriage articles, signed by the parties, made in contemplation of a marriage shortly to be had, were receivable as evidence of the marriage.

(i) *Vaux of Harrowden Barony*, Min. Ev. p. 44.

(k) *Borthwick Barony*, Min. Ev. p. 62.

admissible. Thus, in a recent case in Chancery, the recital in an indenture of assignment of a term, that the assignee was the son of certain parties, was held inadmissible to prove that fact, because the assignor, who alone executed the deed, was not a member of the family.<sup>(l)</sup> And in *Fort v. Clarke*, Lord Gifford, M. R., decided, that recitals of pedigree, in a deed of conveyance, whatever effect they might have against the parties to the deeds, could not as against third persons, be any evidence of the pedigree.<sup>(m)</sup> In a recent Peerage case, however, a copy of a contract marriage, dated in 1684, attested by two notaries, but not by the parties, and produced from the muniment room of the family, was admitted as evidence of the relationship stated in it. The Lord Advocate, on behalf of the Crown, stated that it would be held good evidence in Scotland if it were proved that the original could not be obtained, which was done.<sup>(n)</sup>

The evidence derivable from deeds, is not confined to what may be drawn from recitals of descent, or descriptions of parties. The whole tenor and effect of these instruments will often, by the mode in which property has been dealt with, afford strong inferences as to the state of families or individuals at the time of execution. Reference is made to a former part of this work for various illustrations of this branch of the subject.<sup>(o)</sup>

[ \*676 ] \*It seems, that where an Act of Parliament has rendered the enrolment of a deed necessary, an examined copy of that enrolment will be admitted to prove the contents of the deed, even by the House of Lords, in claims of Peerage. An objection to evidence of this description was overruled in the *Vaux* case.<sup>(p)</sup>

In the case of *Collins v. Maule*, an examined extract of the registry of deeds of the county of Middlesex, was tendered as secondary evidence of the contents of a deed, dated in 1791, to prove the description of one of the parties to it. The evidence was objected to, but Tindal, C. J., though he observed, that there was very little evidence of inquiries for the original deed, received the evidence, taking a note of the objection.<sup>(q)</sup>

A slip of parchment, said to have been found in a shoemaker's shop, and marked Mr. A. B.'s measure, which apparently contained two lines of an old deed, reciting a descent, having been rejected in evidence, the Court of King's Bench is said to have granted a new trial on the ground that it was improperly rejected in a case depending on

(l) *Slaney v. Wade*, 1 My. & Craig, 238.

(m) 1 Russ. 604.

(n) *Huntly Marquissate*, Min. Ev. p. 15.

(o) *Sup.* p. 211, *et seq.*

(p) Min. Ev. p. 81. It may not be improper to notice in this place, as affording genealogical evidence, a valuable collection of charters in the British Museum. Many of these extend to a later period than the reign of Charles I., and the majority are very much older than the time of Richard II. Of these documents it has been remarked, that in one instance, charters have been found which establish no less than five descents of a pedigree; and there are but few families whose genealogy would not receive material illustrations from them. Charters granted by the Scottish Monarchs, of certain lands upon the death of the ancestors to their successors, and reciting descent, marriages, &c. have been admitted as evidence thereof by the House of Lords. Proceedings in the House of Lords upon disputed claims to vote at election of Scotch Peers, 1791, p. 109.

(q) *Collins v. Maule*, 8 Car. & P., (34 E. C. L. R.) See *Ubele v. Kilner*, *ibid.* 2. 289.

reputation. It afterwards appeared that the parchment was a fabrication.(r)

Secondary evidence of genealogical matter contained in a deed may be given. In a trial at bar in ejectment, it was offered in evidence *visâ voce*, that at a trial in ejectment against the defendant, for parcel of the land then in question, the defendant produced a deed of release, which had a clause in it to prove the pedigree. The Court held this good evidence, because the defendant might \*give [ \*677 ] that very deed in evidence if he would, and having the deed in his custody, he might disprove the witness if he swore falsely.(s)

It has been observed, that no documents afford more satisfactory evidence than wills, for fixing the identity of persons, and their several relations. In them is to be found certain proof of the existence, the individual connexions, and the line in which families have descended.(t) Wills being admissible upon the principles above stated as governing hearsay evidence, it is not material that they should be valid or subsisting instruments, if only there is sufficient evidence of their authenticity. Upon an ejectment, a paper purporting to be a will signed with the mark of the testator, and duly attested, but with the seal torn off, found in a drawer in the house of the person last seized, among some other documents belonging to him, was produced by the defendant to shew the existence and seniority of an ancestor through whom he claimed. This evidence was admitted, and on a motion for a new trial, Lord Ellenborough considered that it had been rightly admitted: that it must be taken that the paper had been kept by the person last seized, with other family papers, as something relating to his family, and might be considered as recognising that there was such a person in the family.(u)

The probate of a will is not evidence in an action for the recovery of real estate, even to prove a pedigree stated in the will.(v) The probate is only a copy, and the fact of its being authenticated by the seal of the Court, does not render it a good substitute for the original, to prove the truth of its contents. Thus, in ejectment, a copy of a register of a will, and the probate of the same will were both rejected by Holt, C. J., though tendered to prove a pedigree, and not to make title under the will.(w) It is said, however, that afterwards on the same \*circuit, Tracy, B., admitted the same probate as [ \*678 ] evidence of the pedigree upon the trial of an issue out of Chancery, distinguishing that from a trial in ejectment, because, he could not know that the title to the land would come in question; but it has been questioned whether this is a sound distinction, because, even in the ejectment, the title to the land was not derived under the

(r) Per Thomson, B., 2 Peake, N. P. C. 205.

(s) Eccleston v. Petty, Carth. 79.

(t) Prelim. Obs. Nicolas, to Test. Vetust. p. 1. 11.

(u) Doe d. Johnson v. Earl of Pembroke, 11 East, 504.

(v) Roll. Ab. 678; Bul. N. P. 240. Doe d. Weld v. Ormerod, 1 M. & Rob. 466.

(w) Dike v. Polhill, Lent Assizes, 1701, Lord Raymond, 744. Perhaps a question might be raised, whether a register of a will in the county of York or Middlesex ought not to be admitted, as those registers are made under the authority of Acts of Parliament, and therefore, the reason applicable to a probate of a will of lands would not apply to such registers. Vide 2 & 3 Ann. c. 4, ss. 20, 21; 6 Ann. c. 35, ss. 14, 15; 7 Ann. c. 20, ss. 8, 9; 8 Geo. 2, c. 6, ss. 15, 16.

will.(x) In the case of *Doe d. Weld v. Ormerod, Alderson, B.*, refused to receive a probate as evidence of pedigree, upon the authority of *Dike v. Polhill*, considering himself bound by the decision in that case, though he declared that he was not satisfied with the principle of it.(y)

The ledger book of the Ecclesiastical Court, which is the Roll of the Court, and not a mere copy, is admissible to prove a pedigree.(z) This was admitted in the *Vaux Peerage case*.(a)

By the stat. 55 Geo. 3, c. 60, it was enacted, that no will made by any petty officer, or seaman, non-commissioned officer of marines, or man in the King's service, shall be valid to bequeath any wages, pay, or prize or bounty-money, unless it shall contain, among other things, a full description of the relationship or residence of the person or persons, to whom or in whose favour as executor or executors the same shall be granted or made. If the testator died after having left the service, an extract from the parish register of his burial, or of some other authentic evidence of death was required to be sent to the Navy Pay-Office. By the same statute, it was enacted, that at the death of such seaman or marine intestate, application was to be made by the next of kin at the same office, in a particular way pointed out by the Act for a certificate to enable them to administer. The petitions, certificates, and other documents lodged at the office of the Inspector of Seamen's Wills at the Navy Office, in pursuance of this Act, as well as the wills themselves, will often afford the means of tracing and [ \*679 ] identifying individuals. This act was \*repealed by 11 Geo. 4 and 1 Wm. 4, c. 20, which, however, contains enactments of a very similar nature.

It is customary in claims of Peerage, to require the production of the original wills, or to account in a satisfactory manner for their non-production.(b) The practice, however, has not been very uniform. In the *Braye case*, in 1836, the Record Book from the Prerogative Office, was offered in proof of the will of Sir Robert Peckham, 1569, to shew that he died without issue, but the Lords objected to receiving it. The *Lisle case* was referred to as an authority, in which the book had been admitted;(c) but it was stated that there a search had been made at Penshurst for the original will which could not be found, and without some evidence of a search for the original, the book could not be admitted.(d) It does not appear to have been noticed on this occasion, that in the *Roos case*, such a book was admitted without, as it seems, any evidence of search for the original will among the family muniments.(e) A little later in the same year, the same question occurred in the *Vaux case*. Upon that occasion, the counsel for the claimant stated, that in many cases formerly, original wills were returned to the parties with the probate annexed, a practice adverted to in Lord Coke's 3rd Inst. p. 149, and 4 Inst. p. 336: that a statute was passed 21 Hen. 8, regulating the fees for probates of wills, and granting of administrations: that when the party did

(x) *Runnington on Ejectment*, 343.

(y) 1 Moo. & Rob. 466.

(z) Bul. N. P. 246.

(a) Min. Ev. p. 188, post p. 679.

(b) *De Lisle Barony*, Min. Ev. p. 158, and *Peerage cases passim*.

(c) *Nicholas's Lisle Barony*, 51; Min. Ev. pp. 203, 206.

(d) *Braye Barony*, Min. Ev. p. 70.

(e) *Roos Barony*, 1804, Min. Ev. p. 278.

not bring a copy for a probate to be annexed the probate was frequently affixed to the original: that the will in question, appeared on the face of it, to have been compared with the original, which was stated to have been returned: and he produced the ledger in which the same was registered as of record. This seems to have been satisfactory. (f) The evidence given on a subsequent occasion states, that the practice of delivering out the original wills, and retaining copies, was continued till about the year 1700; and that from 1380 to 1480, but one original will had been found in the office. Upon this evidence, and upon reference to the Braye and Vaux cases, the registered copy of the will in question was allowed to be read *de bene esse*. (g) It does not appear, that on this occasion it was brought to the notice of the House, that in the Tracy case in 1839, an official copy of a will dated in 1662, which was stated to have been left on the file when the original was delivered out, was received without objection. (h)

In order to put in evidence a copy of a will, it was first proved that no register of the probate of it could be discovered in the proper offices; then a deed executed by the testatrix, in which the power to make a will was recited was put in; and lastly, receipts for legacies given by the will were produced to shew that it had been acted on; the copy of the will was then allowed to be read. (i)

Examined copies of wills in the Prerogative Office of Ireland have been admitted *de bene esse*, but it was held that the originals ought to be produced. (j)

The official copy of a will, signed by the Registrar of the Bombay Court, and sent from thence to the Prerogative Court of London, and registered there as the original, and of which probate was granted by that Court, was received in evidence by the House of Lords in the Tracy case cited above. (k)

Before leaving the subject of wills, it may not be improper to remark, that a considerable number of original wills are preserved among the charters in the British Museum. Many wills are also to be found recited in inquisitions *post mortem*, the originals of which would be vainly searched for in other quarters. (l)

The books of administrations at the Prerogative Office are admissible to prove matters of pedigree incidentally appearing \*from the proceedings therein recorded. In the Tracy Peerage case, the death of F. Tracy in youth, was proved by the production of the book of administrations for 1683, in which he was described as an infant in the entry of a commission issued to his mother to administer to him. (m)

Where statements of pedigree have been incidentally made in bills, answers, and depositions in Chancery, not calling in question the facts, such statements seem admissible on the footing of declarations. Lord Mansfield considered the answer of parents to a bill in Chan-

(f) Vaux of Harrowden Barony, Min. Ev. p. 188. See also Tracy Barony, Min. Ev. pp. 62, 66. (g) Fitzwalter Barony, 1842. Min. Ev. p. 13.

(h) Tracy Barony, Min. Ev. p. 13. (i) Camoys Barony, Min. Ev. p. 465.

(j) Roscommon Earldom, Min. Ev. 1826, p. 7. (k) Min. Ev. p. 34.

(l) See Powell's Rep. of Rec. 1631, p. 6. Directions for search of Rec. 1622, p. 71.

(m) Tracy Barony, Min. Ev. p. 37. See also Stafford Barony Min. Ev. p. 152.

every admissible, as evidence under their hand of their having made the declarations contained therein.(n) And Lord Kenyon is stated to have expressed the opinion, that a bill in Chancery by an ancestor, was evidence to prove a family pedigree stated therein, in the same manner as an inscription on a tombstone, or in a family bible.(o) Some cases there are which might seem to militate against the correctness of these opinions; but they may be satisfactorily explained, as having been decided on independent principles. Thus in one old case, it was held that an answer was not evidence of pedigree, because, being the answer of an infant, it was put in by guardians; and even in this case, there seems to have been some doubt in the minds of the Judges as to the propriety of rejecting it.(p) In another case, where the answer of a mother as to the fact of her marriage, was tendered on the trial of an issue out of Chancery, as to the legitimacy of her son, the objection taken to its admission was, that the person against whom it was tendered, did not derive any title through the witness. It is also clear from the report, that the evidence was open to the further objection that the mother herself was alive at the time. The reporter adds, that the Lord Chancellor (Macclesfield) thought it hard that such evidence had been rejected, though it might be a question whether it was conclusive.(q)

[ \*682 ] So in Piercy's case, depositions in a suit were rejected as \*evidence, because they were not accompanied by the answer.(r) In the Banbury Peerage case, in answer to questions put by the House of Lords, the Judges stated that neither a bill filed for the perpetuation of testimony, nor depositions taken in the suit, would be received in evidence in the Courts below on the trial of an ejectment, against a party not deriving title through any of the parties to the Chancery suit, either as evidence of the facts therein deposed to, or as declarations respecting pedigree. And they added, that it would not make any difference in their opinion, if the bill had been a bill seeking relief. The Attorney-General had objected to the admission of the evidence on two distinct grounds; 1st. Because the suit was *res inter alios acta*. 2nd. Because it did not appear that the witnesses were connected, in the manner stated by them in their depositions, with the persons respecting whom they deposed.(s) The latter of these objections would be sufficient to prevent the reception of the evidence, without the existence of any general rule as to the inadmissibility of statements contained in bills or depositions; and it would seem, that the Judges, in answering the questions put to them, considered the evidence as subject also to the objection of *lis mota*. At all events, it has long been the practice of the House of Lords to admit as evidence of pedigree, bills, answers, and other proceedings in Chancery, where the facts of pedigree were not in dispute, but only incidentally mentioned.

The original proceedings in Chancery, being the bill and answer in a suit in 1627, were received in evidence in support of the petitioner's claim to the Barony of Zouche of Haryngworth.(t) And the

(n) *Goodright v. Moss*, Cowp. 594.

(p) *Eccleston v. Petty*, Carth. 79. S. C. Comb. 156.

(q) *Hilliard v. Phaley*, 8 Mod. 180.

(r) *Gardner Barony*, by Le Marchant, p. 410.

(s) 7 T. R. 3, note.

(t) *Jones*, 164.

(u) *Min. Ex.* p. 221.

examination of a defendant upon interrogatories before the Master, in pursuance of a decree in a suit instituted in 1736, was produced from the Tower, and received in evidence in the recent claim to the Barony of Fitzwalter.(u) In the Galmoye Peerage claim in 1828, a bill in Chancery filed in 1678, by one of the family, and the answers of the defendants, also members of the family, were received in evidence by the Attorney-General for Ireland.(v) So in the Netterville case, a bill and answer in Chancery in Ireland, were admitted to prove the death of a \*party, and the succession of his heir, by admissions in the answer.(w) It does not appear [ \*683 ] that the defendant, whose admission was relied on, was a member of the family.

Such evidence, however, must always be received with caution, since it is obvious that erroneous admissions may easily be made when the parties have no particular interest to ascertain the precise facts. And this may be done, either through inadvertence or design. It appears that in the case of *Le Neve v. Norris*, the contrivance was resorted to of filing a bill against John Neve, describing him as heir of Oliver Neve, in order to give strength and countenance to his title, and afterwards upon the trial of an ejectment, it was used as evidence of the pedigree.(x) Positive averments in an answer, which is put in upon oath, will, of course, be entitled to more credit than the statements of a bill, which often are made at variance with, or in ignorance of the truth. And it should be remembered, that answers and examinations are authenticated by the signature of the party himself, a circumstance which may reasonably give them a degree of weight, to which bills, not being so authenticated, are not entitled.

A petition of Lord Viscount Netterville to the commissioners, under an act passed after the Restoration, for settling the affairs of Ireland, produced from the office of Surveyor-General of Lands in Ireland, containing statements of pedigree was admitted in evidence.(y)

In order to prove that Christopher Lord Slane left an only daughter, Ellen Fleming, an examined copy from the books of certain trustees, appointed under an act respecting forfeited estates in Ireland, which were in the custody of the Commissioners for Woods and Forests, of a claim made by her guardian in which the relationship is stated, was given in evidence.(z)

\*Affidavits sworn by parties for the purpose of procuring marriage licenses, are admissible as declarations. In [ \*684 ] the case of *Beer v. Ward*, the affidavit of W. Cotton, in order to obtain a license previous to marriage in 1742, in which he described himself as a *bachelor*, and his intended wife as a *spinster*, and the bond on the same occasion were put in evidence.(a) It is worthy of remark, that with respect to the description of bachelor and spinster in the affidavit and bond to obtain license, C. J. Abbott said, "There is very little to be derived from it. You will find very few instances

(u) Min. Ev. p. 105.

(v) View of Legal Institutions, &c., 1830, p. 279.

(w) Min. Ev. p. 43. See also *Marchmont Earldom*, Min. Ev. pp. 358. 361. *Athenry Barony*, Min. Ev. p. 32, surreplication, dated 1567, admitted. And see ib. pp. 34. 39.

(x) *Le Neve v. Norris*, 4 Brown's Parliamentary Cases, 479.

(y) *Netterville Viscounty*, Min. Ev. p. 5.

(z) *Slane Barony*, Min. Ev. p. 28.

(a) *Beer v. Ward*, 1st issue, p. 172.



indeed when the first marriage is recited, and the second is said to be celebrated for and in assurance, &c., though it ought to have been so."(b)

An affidavit made, on a similar occasion, was adduced as evidence of the age of a party in the Roxburgh Peerage case. The book of affidavits was produced from the registry of the Consistory Court of Worcester.(c)

On the claim of Matthew Barnewall to the Viscounty of Barnewall of Kingsland and Barony of Turney, to prove a part of the pedigree of the petitioner, two cases for the opinion of counsel, drawn up about 1740, and proved to have been found among the family papers, were admitted by the Irish Attorney and Solicitor-General,(d) and admitted *de bene esse* by the Committee of Privileges, and they do not appear to have been afterwards repudiated.(e) But in a subsequent case a document of a similar nature was rejected. To prove the death of the several sons of Sir Gregory Byrne, a case prepared for the opinion of counsel in 1777, and found among the papers of a member of the family, was offered in evidence. An objection being taken, the Leigh Peerage was cited, in which a case made by an executor for the opinion of counsel had been received. The committee held that it could not be taken as a declaration, statements for counsel [ \*685 ] being frequently made to obtain a favourable opinion to drive \*persons to a reference; that it might have been made by the attorney, who generally draws the case; and that it was not connected with the person whose declaration it purported to be. The evidence was withdrawn.(f)

It has been stated, that instruments of pedigree may be received in evidence without proof of their origin, if they have been acknowledged or treated as authentic, by members of the family. An acknowledgment sufficient for this purpose may be presumed from various facts. The publicity of the instrument is an obvious ground of presumption that its contents are true. Thus, a chart of a pedigree openly hung up in a family mansion, is receivable in evidence, because it cannot be supposed that an erroneous document would be permitted to remain in such a position.(g)

It is not essential to the admissibility of a document of this nature that it should have been publicly exposed; even though it may have been privately kept, if it clearly appears to have been preserved by members of the family as an instrument of value, it will be admissible upon the same principle of adoption and acknowledgement, unless it can be impeached upon other grounds. Thus, in the Vaux Peerage case, a pedigree produced from among the family papers, was admitted without objection.(h)

But where a manuscript, purporting to be the history of a family, was produced from among the archives of the family, without any evidence that it had been known to, and recognised by any members of the family, the House of Lords refused to receive it.(i)

(b) 2nd Issue, p. 115.

(c) Roxburgh Dukedom, Min. Ev. p. 171.

(d) Printed case, p. 6.

(e) Printed Minutes of Evidence, pp. 22, 94.

(f) Slane Barony, Min. Ev. pt. 2, p. 43.

(g) 2 Cowp. 594. Slaney v. Wade, 1 My. & Cr. 356. Johnston v. Parker, 3 Phill. 82,

(1) 2 Ecc. R.)

(h) Vaux of Harrowden Barony, Min. Ev. p. 62.

(i) Lovat Barony, Min. Ev. p. 81.

It is the practice of the House of Lords to require a satisfactory account of the custody and recognition of documents of this nature, where the authorship is not proved. Thus, in a recent Peerage case, witnesses were very particularly examined as to the history of a pedigree tendered in evidence; and failing to satisfy the House that it had been treated as an authentic document, [ \*686 ] it was rejected.(j)

In the Camoys Peerage case, a MS. book of pedigrees of the Townshend family, stated by the witness to have been delivered to him by Lord Charles Townshend at Raynham Hall, the family seat, was tendered. It was held, that as there was a person who could give a better account of the history and custody of the documents, he ought to be called. Subsequently, Lord C. Townshend attended, and having stated that the book had belonged to his father, at the sale of whose library it had been purchased by himself, and replaced in the library at Raynham Hall, where it remained until he delivered it to the former witness, the book was admitted.(k)

But a pedigree, found in the Ashmolean Museum at Oxford, not proved to have been either made or recognised by any member of the family, was rejected.(l)

The same rule applies to all instruments by which a genealogical fact is sought to be proved, either directly or by inference. In the late claim to the Barony of Vaux, a proposal by Lord Vaux for the settlement of his estates, was tendered to show the state of the family, and to afford the inference that William his brother was then dead without issue, the presumption being, that if he had been alive, provision would have been made for his issue. The evidence being objected to, the counsel were informed that it did not appear to the committee to be evidence, not being signed by any member of the Vaux family, nor open to the inspection of the members of that family.(m)

But family recognition, though necessary, will not be sufficient to make a pedigree admissible evidence, unless it be otherwise unimpeachable. In a recent case at law, a pedigree, which appeared to have been kept as of value by the family, but which \*purported to be collected from parish registers, wills, monumental inscriptions, family records and history, was held inadmissible. Tindal, C. J., observed, that on the face of it, there was a certificate, which shewed it could be considered only as a secondary evidence; the sources from which it was pointed out to have been compiled being different from any which are generally resorted to in pedigrees which have been received. Those sources ought to have been themselves produced.(n)

The case of Hood v. Beauchamp, seems to have somewhat extended the principle of admitting instruments of pedigree upon the ground of family acknowledgment. In that case, the plaintiffs, in order to prove that William Jennens, under whom they claimed, was descended from Humphrey Jennens, produced an old religious book, containing the following entry, "Elizabeth Jennens, her book, 15 June, 1680,

(j) Fitzwalter Barony, Min. Ev. p. 44.

(k) Camoys Barony, 6 Clark & Fin. 801.

(l) Chandos Barony, Min. Ev. p. 11.

(m) Min. Ev. p. 215.

(n) Davies v. Lowndes, 8 Bing. N. C. 66, (35 E. C. L. R.)

the gift of Humphrey Jennens, her father." The owner of the book deposed, that it was given to him by his grandmother, who used to tell him that her father married Elizabeth Jennens; it was not known by whom, or when, the entry was made, except that it was made before the death of William Jennens. The book contained in other parts entries of the births of members of the family, which were proved to have been made by the witness's grandfather. It was contended that the first mentioned entry was not evidence, as it was not proved by whom it was made. The Vice-Chancellor said that the book was a religious book, and therefore might be classed with a bible or a prayer-book; but that the admissibility of the entry did not alone depend upon the nature of the book in which it was made; that the book was held to be of value by the family, and had been preserved by them, not only because it was connected with their religious belief, but because it contained an important family memorial, and on that account, the grandfather, before he delivered it to his grandson, thought it right to make the other entries in it. And his Honour was of opinion that the book was admissible for the purpose for which it was produced.<sup>(o)</sup> It is [ \*688 ] observable, that it does not appear from \*the report of this case, that there was any evidence that the book in question had been treated as containing an important family memorial, before the time when the entries were made by the witness's grandfather. Up to that time the book had only contained one entry, in which a single descent was incidentally mentioned, and therefore could be considered to have been selected as the register of the family. The insertion of the subsequent entries by the witness's grandfather, might be considered as an adoption by him of the statement which he then found existing in the book: so that, in effect, the entry would be treated as a statement of a widower, as to the paternal relationship of his deceased wife's mother.<sup>(p)</sup>

Engravings upon rings worn publicly, have been admitted as evidence upon similar principles, the presumption being that a person would not wear a ring with an erroneous inscription.<sup>(q)</sup> It is the custom of the Jews to engrave upon their wedding rings the date of their marriage.<sup>(r)</sup>

An inscription on a picture in a fixed panel in a room in a family mansion, has been considered admissible by the committee for privileges in the House of Lords, on the same principles of publicity and family acknowledgment.<sup>(s)</sup>

Monumental inscriptions form a valuable and extensive branch of genealogical evidence, admitted both in courts of law<sup>(t)</sup> and by the House of Lords, in peerage claims.<sup>(u)</sup> The custom of recording upon tombs many particulars of the individual history, and family connections of the deceased, in whatever feeling it originated, had at least

(o) *Hood v. Beauchamp*, 8 Sim. 26.

(p) See as to statements of husband as to his wife's family, *sup.* p. 657.

(q) 13 Ves. 144; 2 Russ. & My. 164.

(r) *Grim. Orig. Gen.*

(s) *Camoye Barony*, 6 Clark & Fin. 801.

(t) Per Lord Mansfield, *Cowp.* 594; 13 Ves. 144. 514; *Bul. N. P.* 233; 7 T. R. 3 n.; 10 East, 120; 1 Lilly's Pr. Reg. 552.

(u) *Rose Barony*, *Min. Ev.* pp. 128. 139. *Hastings Barony*, *Min. Ev.* pp. 290. 313. *Tracy Barony*, *Min. Ev.* p. 34.

the advantage of supplying to a considerable extent, the evidences of descent, so important in guiding the devolution of property and dignities, at a time when no regular system for the attainment of that object had been \*introduced. It seems to have been by no means [ \*689 ] uncommon to give particular directions in wills respecting the monument to be raised to the testator;(v) and the observance of such directions will often supply proof of the identity of a testator with the person to whom a monument has been erected.(w) At the dissolution of the monasteries, in the reign of Hen. VIII., and afterwards in the reign of Edw. VI., great numbers of monuments were defaced and destroyed; partly through superstition, but more frequently for the sake of plunder. This practice attained to such a height, that in Queen Elizabeth's time, it was found necessary to check it by royal proclamation. Two proclamations were issued, one in the second, and another in the fourteenth year of her reign, forbidding the defacement of monuments, under pain of fine and imprisonment. "Unhappily," as Sir W. Dugdale observes, "these proclamations came too late, that mischief being done which could not be repaired."(x) It may not be improper to notice, that at the commencement of the Long Parliament, Sir W. Dugdale, foreseeing the course which puritanical zeal was likely to take, and encouraged by Sir Christopher Hatton, then a member of the House of Commons, made a circuit through the country, attended by a skilful heraldic painter, and took exact drawings of all the monuments and coats of arms, in many of the principal cathedral and collegiate churches. These drawings, soon after Dugdale's death, were in the possession of the then Lord Hatton. Amongst the MS. volumes presented by Dugdale to the College of Arms, is one large volume of the arms and monuments in the cathedral of York and various other churches in that county.(y)

\*No case has been met with in which it has been at- [ \*690 ] tempted to use these copies as evidence of the inscriptions and emblazonments which they have preserved. Inscriptions, only partially defaced, might, it should seem, be proved by copies, if enough should remain legible to show an apparent agreement between the copy and the alleged original. A copy of a nature apparently equally unofficial, has been admitted by the House of Lords under such circumstances. In the claim of Thomas Stapleton, Esq., to the Barony of Beaumont in 1790, a monumental inscription, once existing in a monastery in France, was allowed to be read from a printed book, entitled "*Memoires des Constitutions des Benedictins Anglois*," on its being proved that there was still remaining in the said monastery a

(v) Bridget Lady Marney, by her will, dated 10th Sept. 1549, gives directions concerning her monument, and concludes, by directing to be placed, "at the head or feet, a scripture of brass to shew the time of my decease, what stock I was of, and to what men of worship I was married."—*Testamenta Vetusta*, p. 737.

(w) *Camoy's Barony*, Min. Ev. p. 58.

(x) Dugdale's *Barony*, Pref. p. 6. The author laments with much feeling and just indignation, this "execrable dealing," which took place at the periods above mentioned, and was renewed again in his own time under the influence of the Puritans. See also as to the destruction of monuments, &c., Gough's *Less. Mon.* Preface to vol. 1, p. 5; Weever's *Fun. Mon.* 1631, p. 51.

(y) See an 8vo. Tract in the British Museum, containing a life of Sir W. Dugdale, without date, but apparently printed soon after his death, in the year 1685, p. 11.

stone, on which, though then applied to other purposes, and in great part defaced, were legible letters, exactly corresponding with the incipient letters of several lines in the printed inscription.(z)

The copies of monuments contained in the church notes taken by the herald on visitations, as mentioned in a former page,(a) seem to stand on higher ground, and are perhaps admissible as official documents.

The admissibility of a monumental inscription, has been considered to depend upon the publicity of its nature, and not upon any established connection with the family to which it relates.(b) There is, however, at least, a strong general presumption that such records originated with some relation of the deceased. As the authorship of such inscriptions is not inquired into, this species of evidence has been justly remarked to trench on the rule which rejects secondary evidence, inasmuch as the author of it may be alive.(c)

Examined copies of these inscriptions are admitted for the sake of [ \*691 ] convenience; the physical difficulties in the way of producing \*the originals, affording even stronger reasons for this relaxation of the strict rules of evidence, than those which have prevailed in the case of public books. The admissibility of this evidence is not affected by the circumstance of the originals being in a church, or churchyard. Mr. Justice Park seems to have had doubts on this point, and, not without hesitation, admitted an inscription on a tombstone in a Dissenter's burying ground to prove a death.(d) But there seems no grounds for such doubts in the principles on which the evidence is admitted, and authority is in favour of the admissibility. In the case of the Barony of Say and Sele in 1781, an inscription on a tombstone in the burying ground for Dissenters at Bunhill Fields, was admitted on behalf of the petitioner.(e) In the more recent case of the Hastings Barony, the inscription on a monument at Basle in Switzerland was proved as evidence of the death of the person to whom the monument was erected.(f) The same principle that would exclude a monumental inscription in a Dissenter's burial-ground, would equally apply to inscriptions in foreign churches or churchyards.

The fragments of a shattered tombstone, which being fitted together, presented a legible inscription, were relied on by the Attorney-General,(g) and a brass plate detached from the wall over a monument, where it was satisfactorily shewn to have been formerly fixed,(h) has been admitted by the House of Lords.

Where a monumental inscription has been renewed, by refilling the letters with white paint, proof was required of the accuracy of the renovation. The clergyman of the parish gave evidence that he had been present daily during the renovation, and having been well ac-

(s) Grim. Orig. Gen. p. 304, citing the Beaumont Peerage, Printed Minutes, 1795, and Townsend's Prospectus of Baronies by Writ.

(e) Sup. p. 544.

(b) Per Lord Brougham, C., *Monkton v. Attorney-General*, 2 Russ. & My. 163.

(c) Phil. & Am. on Ev. 1, 233, n. 2.

(d) *Whittuck v. Waters*, 4 Carr. & P. 376, (19 E. C. L. R.)

(e) Serjt. Hill's Collections, Lincoln's Inn Library, vol. 26, p. 173.

(f) Min. Ev. p. 197. See also the case of the Beaumont Peerage, cited in Grim. Orig. Gen. sup. p. 690.

(g) *Huntingdon Earldom*, by Bell, 1820, p. 252.

(h) *Canoy's Barony*, Min. Ev. p. 65.

quainted with the inscription before, could state that it had not been altered. He also produced a copy taken before the renovation.(i)

Where monuments have decayed by time, or have been \*destroyed or removed, the House of Lords has admitted [ \*692 ] the testimony of witnesses as to their existence, and the inscriptions on them. In the Roscommon case, the existence of a tombstone in the churchyard at Kilkenny, and in the Leigh case, that of a monument in Stoneleigh Church, was the point on which the cases respectively turned, and to establish which numerous witnesses were examined.(j)

The credit of monumental inscription may always be impeached, and their evidence seems peculiarly open to attack; not only on account of the great facility of forgery, but also, because the preparation of them is often committed to undertakers, executors, or other persons not members of the family; or because, perhaps, the inscription has been delayed till a period when the facts are but imperfectly remembered. In the claim of Katherine Bokenham to the Barony of Berners, an inscription upon the tombstone of a person who was one of the links in the pedigree was given in evidence; but it appeared from the entry of her burial in the parish register, and from her will, that there was a mistake of a year on the tombstone as to the time of her death, and the mistake is said to have arisen from a delay in laying down the stone.(k)

It is the modern practice in claims of peerage to make some inquiry, though not a very strict one, as to the antiquity of a monument, from which an inscription is tendered; and it seems that it must be shewn to have existed so long, at least, as to afford a reasonable presumption that it was erected with no interested views, for the purpose of fabricating evidence. Where a witness stated that a monument to a person who died in 1749 had been recently erected, it was considered inadmissible, although erected in pursuance of directions contained in the will of that person, \*until some further evidence of its [ \*693 ] date had been adduced; but afterwards, the parish clerk having sworn that he remembered it when a boy more than thirty-seven years before, it was admitted.(l) And in other cases witnesses have been examined as to the apparent antiquity of the monuments,(m) and the length of time that the witnesses have known them, and where their knowledge has been recently acquired, further evidence has been called for.(n)

A mural inscription has been received in evidence, which gave a

(i) Camoys Barony, Min. Ev. p. 65.

(j) See also Tracy Barony, Min. Ev. p. 181, and the case of Slaney v. Wade, cited post, p. 693.

(k) Collins on Baronies, p. 363, and note. It has been observed, that preservation of monuments is frequently of much service in correcting the omissions and mistakes of parish registers. (Thorpe's Customale Roffense, Preface, p. 111.) The case above cited, however, may serve to shew, that where monuments and registers disagree, the error is not always on the side of the latter. There are many well known instances of similar mistakes; as on the monuments to Spencer, Sterne, and Goldsmith.

(l) Athenry Barony, 1836, Min. Ev. p. 45.

(m) Vaux Barony, Min. Ev. p. 129. Fitzwalter Barony, Min. Ev. p. 34.

(n) Tracy Barony, Min. Ev. pp. 77. 80. Ibid. 70. A residence of two years in the parish by the curate, and an acquaintance of the same standing with the monument in question, was not considered sufficient.

historical account of a family, and was placed in a chancel, formerly used as the burial place of the family, and which was part of the church belonging to the parish where the family had long been landed proprietors; and in the same case, it was held, that although the inscription had been defaced twenty-four years previously, its contents might be proved by copies taken when the inscription was entire. The evidence was said to be admissible, as well upon the authority of the cases respecting tombstones, as of those respecting a pedigree hung up in a family mansion.(o)

Inscriptions on coffinplates in family vaults and graves have been admitted in evidence in several peerage claims.(p) One of the witnesses examined before the Ecclesiastical Commissioners in 1830, stated, that in one case, where many leaves of the parish register were torn out, he had supplied the link which was wanting to complete the chain of pedigree, from a coffinplate in the family vault.(q)

In one case, Lord Eldon, under special circumstances, made an [ \*694 ] order that certain parties might be at liberty, at all seasonsable \*times within a limited period, to open the vaults or graves of a particular family, and to inspect all the coffins therein, and the plates on the same, and to take copies of the inscriptions as they might be advised or find necessary; such inspection not to take place but in the presence of some person appointed by the parties reported to be heirs, and on due notice being given to them.(r)

Coat armour has sometimes been relied on in questions of pedigree. Lord Coke speaks of its use to the bearers in "manifesting of what families they be."(s) And Siderfin says, "Arms serve to distinguish family from family, and to prevent branches of the same family interfering with one another."(t) Whilst the heralds possessed and exercised the power of punishing usurpations, some credit may have been due to this evidence, probably on the ground, that by the assumption of a particular bearing the party must have meant to affirm that he was connected in the manner indicated by that bearing with the family to which it belonged. It has, however, been justly remarked, that the use of a coat of arms was never yet deemed to be conclusive *proof* of descent, and it has been matter of complaint ever since any system has been observed in heraldry, that the arms of noble and other families were usurped by persons who had no other pretensions to them than the sameness of surname.(u)

The practice of introducing into churches escutcheons both carved and painted, soon followed the general adoption of coat armour. In stained glass, there are instances as early as the time of Hen. III.;(v) and it was by no means uncommon for testators to give directions by will for setting up such memorials of them. The law protected escutcheons so erected; and the heir had a right of action against any person who might deface them.(w) The claim of Sir Michael Blount to

(o) *Slaney v. Wade*, 1 My. & Craig, 338.

(p) *Chandos Barony*, Printed Min. p. 10; *Rokeby Barony*, Printed Min. p. 4; *Lovat Barony*, Printed Min. p. 77.

(q) *Evidence of Wm. Metcalfe*, Eccles. Com. Rep. Appendix, p. 33, question, 63.

(r) *Shelford on Lunacy*, 212, Ex parte Clarke, Jac. 596.

(s) Co. Litt. 27 a.

(t) 1 Sid. 354.

(u) *Chandos case*, by Belz, App. 4.

(v) *Nicolas Test. Vet.* 1, p. xxiv.

(w) Co. Litt. 18 b; Co. 12. 104. See *Brydall's Jus imaginis apud Angles*, 1675, p. 55.

the Barony of Mountjoy, in the time of Queen Elizabeth, turned almost wholly on the arms in a window at Iver, in Buckinghamshire, set up in \*the reign of Henry the Seventh; and elaborate arguments of the heralds have been preserved,(x) as to the [ \*695 ] credit due to this evidence, in support of the claim of Sir Michael, as heir male of the body of Walter, first Lord Mountjoy, in contradiction to the books in the Heralds' Office, which deduced his descent from Thomas, a brother of this Walter.

In the Huntingdon Peerage case, the Attorney-General admitted in evidence an armorial shield, carved upon oak, which had been given by the late Earl of Huntingdon to the father of the petitioner. On this shield, which was produced from a family chest, were the arms of Stanley and Hastings quartered, in consequence, as it was supposed, of the marriage, in the reign of James I., of Henry the fifth Earl of Huntingdon, with the daughter of Ferdinando Stanley, Earl of Derby.(y) So in the Chandos case, an achievement with the arms of Chandos was produced, which the mother of the claimant proved was hung up in the family mansion when she first married, and that she had heard her husband say it had belonged to his grandfather.(z)

The seniority of an individual in a family, as well as his connection with that family, may be shewn by his bearing the family arms with the proper difference.(a) Thus in the above cited case of the Barony of Chandos, where the claimant alleged, that he was descended from the third son of the first Lord Chandos, he was allowed to give in evidence the arms of his family in Heralds' visitation books, plans of estates, delineations on parchment, and other family papers; which arms a herald proved were those of the Chandos family, with the mark of the third branch.(b) A family deed, sealed with the Chandos arms and crest, was also admitted.(c)

\*The shape, as well as the bearings of an escutcheon, [ \*696 ] will merit the attention of the genealogist; who will often gather useful information from the lozenge-shaped shield of the single woman, or the escutcheon of pretence of the married heiress. The rules which from time to time regulated the quartering of arms and other points in the practice of heraldry, must not be lost sight of: in proportion as a stricter or looser practice prevailed, will be the value in evidence of any specific bearing.(d) Much of the value, if not the actual admissibility, of this evidence depends upon its antiquity. The last Heralds' visitation has been stated to have taken place in the year 1686;(e) and since that time, the exercise of their authority to correct usurpations having been discontinued, the use of armorial bearings has become too indiscriminate to be much relied on as genealogical evidence.

(x) Harl. MSS. 1386. 6141.

(y) Huntingdon Earldom, by Bell, p. 280; Attorney-General, Rep. *ibid.* p. 359.

(z) Chandos Barony, Printed Min. Ev. pp. 40. 49.

(a) Hastings Barony, Min. Ev. p. 313.

(b) Chandos Barony, Printed Min. Ev. pp. 6. 24. 37. 40. 49.

(c) *Ibid.* p. 49. See also Fitzwalter Barony, Min. Ev. p. 49. Bigland observes, that impressions of seals have been found in genealogical matters to be very useful, and laments the prevailing custom of sealing with the seal of the drawer of the instrument. P. 82.

(d) Camoys Barony, Min. Ev. p. 58, evidence of Mr. King, Rouge Dragon, as to the practice in 1578.

(e) *Sup.* p. 542.



The accounts of rates, receipts, and payments, by the churchwardens, may not only be of considerable utility as collateral evidence, in establishing the identity of parties named in the registers, but by the rates made upon the owners of estates, prove the descent of such estates from ancestors to heirs for many generations, and by other miscellaneous entries often afford evidence of births, marriages, and deaths. These records are, in some parishes, of earlier commencement than the regular registers.(f) In the Zouche Peerage case in 1804, parish books of rates and loans were produced, and received in evidence in support of the petitioner's claim, to prove the existence and residence of Mary Connand, widow, at Hanbury, in 1649;(g) and in the Chandos case, the churchwarden's account books for St. Bride's, Fleet Street, for 1641, were admitted to prove a burial which did not appear in the parish register, by an entry of fees paid for it.(h)

By the 17 Geo. II. c. 38, s. 14, it is enacted that true copies of all [ \*697 ] rates and assessments made for the relief of the poor, shall \*be entered in a book by the churchwardens and overseers, and attested by them and carefully preserved. And the statute 46 Geo. III. c. 46, compels the overseers of the poor to keep a book with the name of every parish apprentice, his age, his parents, and other particulars.

Accounts of this nature may be considered official documents, and as such good evidence: they may also be admitted on another ground, as statements made against interest, being acknowledgments of having received sums of money to be accounted for to a third party. So an entry in a book kept by the sexton for the purpose of entering the burial fees received by him, and for which he was accountable to the rector, has been received as good evidence to identify a person by the description of him in such entry.(i)

In the Hastings case, a correspondence between persons not members of the family, giving an account of the death and funeral of a son to be communicated to the father, was produced from the family muniment room. There was also produced an account of the payments made for the funeral, and which was expressed to have been balanced and settled with the person who managed it.(j) It does not appear from the minutes of evidence that this account was in the handwriting of, or signed by the father; but there was an indorsement on it, stating it to be an account of the expenses of his son's funeral. Both the letters and account appear to have been admitted; probably upon the ground that the father, by his mode of treating them had adopted them as his own. In the Vaux case, there was offered in evidence an account of a steward in 1648, found among the papers of Lord Vaux, in which he charged himself on the one hand with divers sums received, and discharged himself on the other by certain payments. It was tendered as a declaration allowed by Lord Vaux, by his retaining it in his possession, as the will of a man found among his papers [ \*698 ] after his death, was evidence of reputation. \*The evidence was objected to by the Attorney-General, and it was held not evidence under the existing circumstances.(k)

(f) Grim. Orig. Gen. p. 290.

(g) Min. Ev. p. 162.

(h) Min. Ev. p. 97.

(i) Lloyd v. Waite, 1 Turn. & Phil. 61.

(j) Hastings Barony, Min. Ev. p. 198.

(k) Vaux Barony, Min. Ev. p. 211.

A book entitled "Records of the Election of Abbesses, and the Professions, and Burials of Nuns," which was stated to be the Register of the Monastery of English Nuns at Paris, was produced in the Stafford case.<sup>(l)</sup> The witness stated that the book was brought over to England at the time of the French revolution, and had been kept by the Abbess at Norwich, and was delivered to him by the last Abbess. It was tendered to prove the profession as nuns, and the deaths, of several ladies of the Stafford family. The entries were signed by the party professing, and were in the following form:—"I Mary Louisa Stafford, borne at St. Germain's En Laye, on the fifth of December, in the year 1696, daughter to the Hon. John Stafford, son of the Right Honourable Earl of Stafford, my mother, Mary Southcott, daughter to the Honourable Sir John Southcott, of Witham in Essex, made my holy profession in the year 1720, being twenty-two years of age, in the hands of our Reverend Mother Constantia Mannock, Abesse, Monsieur L'Abbè de Bourlemont, being Superior, Monsieur Emanuel Chrissmass, our Confessor, performing the ceremonies. In signe whereof I here sett my hand ye 28th of November.

Mary Louisa *alias* Stafford.

St. Constance Mannock, Abbesse, indigne, Emanuel Chrissmass, Thomas Southcott." The name of this lady was Louisa, but it was proved that it was always usual to change the Christian name on making profession. This entry was admitted, but the entries of the deaths appear not to have been considered admissible, though the witness deposed to his own personal knowledge of the fact that it was always customary to keep a register of deaths in those establishments.

In the same case, there was tendered in evidence an original letter missive from King James II. to Lady Stafford, upon the \*699 ] occasion of his coronation, and another dispensing with her attendance.<sup>(m)</sup> It was contended that they were admissible as evidence of pedigree, to shew that the then Baroness of Stafford was recognised as the legitimate heir by the highest possible authority. The Attorney-General did not object to the admissibility of these documents as introductory evidence; but he contended that they were not of themselves substantive and proper evidence. They were, however, delivered in and read.

A license to the Countess of Banbury and her youngest son to travel, dated June, 1641, was put in evidence in the Banbury case, and seems to have been used as a recognition of the legitimacy of the son.<sup>(n)</sup>

A general history may be admitted to prove a matter relating to the kingdom at large.<sup>(o)</sup> In a case respecting the patronage of an Hospital, which belonged to the Queens of England, Speed's Chronicle was given in evidence, to prove the death of Isabel, Dowager Queen of Edward 2; and Pemberton, C. J., said, he knew not what better proof they could have. It was said that in the Lords' House it was admitted by them for good evidence in the Lord Bridgewater's case.<sup>(p)</sup> The same book is also said to have been admitted by Lord Hale, C. J.,

(l) Min. Ev. p. 145.

(m) Stafford Barony, 1812, Min. Ev. p. 163, et seq.

(n) Le Marchant's Gardner Peerage, Appendix, 416.

(p) Lord Brouncker v. Sir Robert Athyns, Skin. 15.

(o) Bull. N. P. 248.

on a former occasion to prove the same fact. In the case of *Steyner v. The Burgesses of Droitwich*,<sup>(q)</sup> the Court said that an history may be evidence of the general history of the realm, but not of a particular custom; and therefore, *secundum subjectam materiam*, it may be good evidence or not; and Holt, C. J., said, that old historians may be good expositors of the reason of laws, though the Lord Coke warns us not to rely on them for law. In the same case it is said, that chronicles were admitted to discover the forgery of a deed, by a mistake in the style of a king.<sup>(r)</sup>

[ \*700 ] But such books are not admissible as evidence of private matters, even in questions of pedigree. In the Leigh Peerage case, it was proposed to offer in evidence an edition of Dugdale's History of Warwickshire, published in 1730, for the purpose of shewing that in that history a full and particular account was given of all the tomb-stones in the Church of Stoneleigh, and that there was no notice taken of the supposed monument of Christopher Leigh. The case of St. Katherine's Hospital was cited, but their lordships were clearly of opinion that this was not evidence.<sup>(s)</sup> In a subsequent case, the counsel was informed, "that he was at liberty to remove any inference which might arise from the statement" of a particular marriage in Surtees's History of Durham;<sup>(t)</sup> which would seem to imply, that though not considered evidence, such books may lay a foundation for an argument.

The same principles apply to other non-official books, though professedly treating of pedigree. In ejectment for the barony of Cockermouth, and the other lands in Cumberland, of Josceline, late Earl of Northumberland, the lessor of the plaintiff derived his title from Sir Ingelram Piercy, the fifth Earl of Northumberland. Dugdale's Baronage, in which it was stated that Sir Ingelram died without issue, was offered in evidence, but was not allowed.<sup>(u)</sup> So in the Marchmont Peerage case, to prove that Alexander Home, brother of Patrick, first Earl of Marchmont, died in the prime of life without issue, Crawford's Peerage of Scotland was tendered. The evidence being objected to, it was submitted that contemporary histories are evidence in the Scotch courts, and also in cases of pedigree in which Scotch property and Scotch titles are in question; and Erskine's Institutes, p. 725, was cited (where it is said, in proof of ancient facts, e. g., proximity of blood, primogeniture, &c., histories compiled by writers of credit near that age when the facts happened, are probative, if they be not contradicted by other historians, as ancient and of equal authority. St. 6, 4, t. 42, s. 16.) The counsel were asked, if they were aware [ \*701 ] of such evidence having been received in the case of a Scotch peerage, and answering in the negative, the evidence was rejected.<sup>(v)</sup>

It has been said that "there are works which scrupulous accuracy, united with stubborn integrity, has elevated to a rank of legal evidence,"<sup>(w)</sup> and Dugdale's History of Warwickshire is cited as an

(q) Skin. 623. S. C. 1 Salk. 281.

(s) Min. Ev. 1829, pt. 2, p. 155.

(u) Piercy's case, Sir T. Jones, 164.

(w) Cited from Whittaker's History of Craven, in Hamper's Life of Dugdale, p. 484.

(r) Fry v. Neal, cited ib.

(t) Vaux Baron, Min. Ev. p. 67.

(v) Min. Ev. pp. 62, 77.

example. But high as Dugdale's character for accuracy deservedly stands, the intrusion of error into even his works, may serve to shew how well founded is the rule which excludes such books as evidence. In Dugdale's *Baronage*,<sup>(x)</sup> there is contained a statement respecting the family of the Earls of Northumberland, which though agreeing with the general opinion of that period, is now proved by incontestible evidence to be erroneous.<sup>(y)</sup>

A strong case of the rejection of a book which seemed well authenticated, and entitled to as much credit as could be given to any non-official volume, occurred in the claim of Sir George Jerningham to the Barony of Stafford. It was desired to prove that Mary, Baroness Stafford, was summoned to attend at the Coronation of King James the Second, as a Baroness by descent, in order of precedency, recognising her title to the more ancient Barony of Stafford, claimed by the petitioner. It appeared, that a list of peers and peeresses to be summoned was made out by Sir W. Dugdale, then King-at-Arms, by virtue of an order of the King in Council, and that such list was approved by his Majesty in Council. The original list being lost, and there being no copy of it, it was proposed to offer as secondary evidence of it a printed book, compiled by Sandford, Lancaster Herald, intitled, "*The History of the Coronation of King James II. and His Royal Consort Queen Mary*," which it would be shewn was written by the king's special command, printed by the king's printer, licensed by the *imprimatur* of the Earl Marshal, and contained the king's sign manual, granting to \*the author the sole privilege of printing the same for fourteen years.<sup>(z)</sup> The Attorney-General in his report,<sup>(a)</sup> states various unsuccessful searches that had been made for better evidence, and that it had been insisted upon as good secondary evidence, but that the result of his opinion was, that it was not evidence; and the Committee do not seem to have received it.

But though books of this description are not admissible as evidence, they may often be useful to the genealogist, in aiding his researches, and directing him to the sources from which the information contained in them was derived. In a case recently before the Court of Chancery,<sup>(b)</sup> inquiries were made for the MS. of a county history, in hopes of finding that the author had received the statement of a marriage, which it was desired to establish, from some member of the family, and so using the history as evidence of family declaration. The inquiry was unsuccessful, and therefore the question whether the MS. would have been admissible, if it had shewn the information to have been so communicated, was not raised.<sup>(c)</sup>

Mention has been made in former pages of various MS. collections, containing information of a genealogical character, which are to be found in some of our libraries.<sup>(d)</sup> Works containing information of

(x) Vol. 1, p. 318.

(y) By the inquisition post mortem Johannis Com. Oxon. 18 Hen. 8. In Collins's *Pessage*, it is stated that the Honourable Henry Hastings of Woodlands had only two sons, but it was proved by a visitation of 1681-2, and other evidence, that he had five.

(z) *Mip. Ev.* p. 97.

(a) Page 61.

(b) *Hood v. Beauchamp*. The book alluded to was Nicholl's *History of Leicestershire*.

(c) See the examination of Mr. Hasted, author of the *History of Kent*, before the Committee of Privileges, in the *Chandos Case*, where it appeared, that a statement in that work, relative to the family of the claimant, had been inserted on the information of the claimant, communicated since the claim had been agitated.—*Beltz*, 123.

(d) *Sop.* pp. 535, 561.

the same kind have been from time to time given to the public. One of the best guides to these works is to be found in Moule's *Bibliotheca Heraldica*, published in 1822. Since that time this information is to be sought for in the *Peerages and Baronetries of the day*, Burke's *Commoners of England*, Burke's *Genealogical and Heraldic History of Extinct and Dormant Baronetries of England, Ireland, and Scotland*, Berry's *Pedigrees and Arms of Families in the Counties of Kent, Hampshire, Sussex, Surrey, Berkshire, Buckinghamshire, Essex, and* [ \*703 ] *Heriford*, and various works illustrative of the genealogies of particular families.

In the year 1814, was published a catalogue of all persons who had graduated at Oxford, from the year 1659. This work contained also a list of all the Chancellors, High Stewards, Vice-Chancellors, and Proctors; of all the burgesses, from the year 1603, and of all matriculations from the year 1701. A work containing similar information, with respect to the University of Cambridge, from the year 1660, was published in 1823.

Beatson's *Political Index*, published in 1806, contains a complete register of the hereditary honours, public offices, and persons in office, from the earliest periods. Beatson's *Parliamentary Register*, published in 1807, contains a chronological register of both Houses of the British Parliament, from the Union in 1708.

Army and navy lists, law lists, clergy lists, court guides, directories, university calendars, and other books of a similar description, may be viewed as standing on the same footing with works of the kind last mentioned. They are, of course, not receivable as evidence; but they may often prove of great service in affording a clue whereby to trace an individual; for which purpose their value is much increased by the alterations and corrections which most of them undergo annually, and some of them at shorter intervals.(e)

It has been shewn, that not only particular statements made by individuals, but also the general reputation prevailing in a family, respecting matters of pedigree, may be given in evidence. Hence, the behaviour of parties, the disposition and devolution of property, and other circumstances of a similar nature, tending to shew what was the family belief as to any genealogical fact are frequently received [ \*704 ] as evidence of such fact. It has been \*thought that, notwithstanding the rule laid down for excluding declarations not made by relatives, evidence of general reputation amongst strangers is receivable in matters of pedigree; but that the evidence must be of a general nature, as that A. was commonly reported to be the son of B., or the father of C. There does not, however, appear to be sufficient reason or authority for excepting such evidence from the rule above mentioned. It is, indeed, frequently said that general reputation and the common opinion of the world are admissible, in ordinary cases, to prove a marriage; but the evidence commonly adduced in such cases is not so much hearsay, as original evidence of circumstances shewing that the parties demeaned themselves as man and

(e) Murray's *Navy List* is published quarterly by the authority of the Admiralty, at which office it is always carefully revised and corrected up to the latest possible date before publication, by an officer appointed for that purpose.

wife; from which a presumption is afforded, that they were actually married.(f)

Consistently with the opinion stated above, it has been questioned whether a verdict or judgment, although not admissible as direct evidence, ought not to be admitted as evidence of reputation in cases of pedigree. In an old case, where the majority of the Judges refused to allow a special verdict to be read to prove a pedigree, because "it was *res inter alios acta*, and the same evidence, for any thing they knew to the contrary, might be ready to be laid before that jury as was laid before the former;"(g) Wright, J., dissented from the opinion of his learned brethren, and thought the verdict admissible, "because in cases of pedigree many things are received which are not allowed in other cases." Mr. Justice Buller says, that this opinion of Mr. Justice Wright was generally approved of.(h) That learned writer expressly lays it down, that the exception to a verdict of being *res inter alios acta*, ought not to be allowed when the fact to be proved is such whereof hearsay and reputation are evidence, and therefore a special verdict between other parties stating a pedigree, would be evidence to prove a descent; for in such case, what any of the family who are dead have been heard to say, or the general reputation of the family; entries in family books, monumental inscriptions, [ \*705 ] recitals in deeds, &c., are allowed. He observes that the opinion of the majority of the Judges in the case of *Neal v. Wilding* was perhaps founded on the case of *Sir W. Clarges v. Sherwin*.(i) Of that case he observes, that there it did not appear either from the issue or verdict, that the same question was inquired into and determined. Besides, the giving a verdict in evidence to prove a particular fact, *viz.* that John had a son Thomas, is very different from giving it in evidence to shew the opinion of a former jury, which is only their deduction from a variety of facts proved to them. It should be remembered, that when Mr. Justice Wright expressed the opinion above stated, and also when Mr. Justice Buller wrote, the rule which confines the admission of hearsay on matters of pedigree, to the declarations of relatives, had not been established. This consideration will lessen the weight otherwise due to their authority. If evidence of general reputation is inadmissible, there is less ground for contending in favour of receiving a verdict, which, at most, is only evidence of the opinion entertained by the jury. The better opinion, therefore, seems to be that the decision in *Neal v. Wilding* was right, and that verdicts, whether as evidence of facts, or of reputation, are inadmissible in questions of pedigree.

The evidence from the conduct of parties, owes all its force to the same source as hearsay declarations. Both are merely manifestations of the understanding and belief of their authors, in regard to the fact in question.(j) Each kind of evidence possesses an advantage over the other, and each is subject to an infirmity from which the other is

(f) See *Harvey v. Harvey*, 2 W. Bl. 877. *Say and Sale Barony*, Serjt. Hill's Coll. vol. 26, p. 169. *Read v. Passer*, 1 Esp. 213.

(g) *Neal d. Duke of Athol v. Wilding*, 3 Str. 1151.

(h) *Bul. N. P.* 233.

(i) 12 Mod. 313, sup. p. 638.

(j) *Mansfield, C. J.*, speaking of a father bringing up his son as legitimate, said, "this amounts to a daily assertion that the son is legitimate." 4 Campb. 416.

free. An express declaration is exempt from that liability to mistaken inference which is incident to the evidence of conduct. On the other hand, the belief of a party is more forcibly proved by his actions than by his words. Conduct strikes with greater weight than a mere declaration, but it is not so certain that the blow will fall on its proper object. When language and action coincide, the evidence, of course, [ \*706 ] acquires \*great strength. This may be illustrated from the case of *Beer v. Ward*. There, a deed was put in evidence, by which certain estates were limited in remainder by the owner to his grandson, the person whose legitimacy was in question, and the deed described him as if he were legitimate: Chief Justice Dallas said, he was quite aware, that besides the manner of describing him, there was an argument arising out of the disposition of the property.<sup>(k)</sup> Perhaps the latter argument is the more weighty of the two. The description of the grandson, as if he were legitimate, might easily be attributed to motives of delicacy, or acquiescence in a practice already established; but it would be more difficult to suppose that the settlor would bestow his estate on one whom he believed to be illegitimate. Either argument taken separately, is comparatively inconclusive, but the two combined become almost irresistible. The act gives point to the expression, whilst the expression explains and accounts for the act.

The disposition of property is, in fact, a branch of conduct, which marks very strongly the belief of the donor, and it has accordingly been frequently relied on in questions of pedigree. Thus, in the *Clinton Peerage* case, in confirmation of the claimant's descent, it was shown that the Honourable Vere Booth, the sole descendant of an elder branch of the family, who died unmarried, in her will bequeathed several family pictures to an undoubted ancestor of the claimant; and that the Earl of Orford, the sole descendant of another elder branch, limited certain estates to the right heirs of his maternal grandfather, which estates were then in the possession of the claimant as such right heir.<sup>(l)</sup> So in the *Lovat* case, the circumstance of an undoubted branch of the claimant's family having bequeathed to members of the family with whom the claimant wished to establish that his own was connected, articles of plate, money, &c., was relied on, although they were not described as relations.<sup>(m)</sup>

In a modern Peerage case, the fact that Sir Wm. Radmylde, [ \*707 ] \*a tenant in tail of lands, had levied a fine and suffered a recovery of them, and afterwards granted them to the use of the Abbey of Westminster, was used, as affording a presumption that he had no legitimate issue; and this presumption was further strengthened by the evidence of his will, in which he gave legacies to some illegitimate children, and appointed their mother executrix, without in any manner alluding to legitimate issue. This evidence appears to have been considered sufficient to establish the fact of his death without legitimate issue, which was a very material point in the pedigree of the petitioner, who claimed as a descendant of one of the sisters and co-heiresses of Sir William.<sup>(n)</sup>

(k) Printed Report of 1st Issue, pp. 39, 40.

(l) *Clinton Barony*, Mr. Serjt. Hill's Collection, vol. 30, p. 331.

(m) Printed Evidence, p. 52.

(n) *Camoy's Barony*, Min. Ev. pp. 39, 41, 49.

The argument derived from the disposition of property is founded on the moral obligation which men are under to benefit their own relatives in preference to strangers. It is not to be presumed that any man will wantonly or wilfully act in defiance of this law of nature.

As the declarations of a person respecting his family connections may be used as evidence in questions concerning such matters, so the absence of such declarations in circumstances likely to elicit them, will raise an inference that there was no ground for making them. The conduct of the party in preserving silence affords a negative proof of his belief, little less strong than that which is drawn affirmatively from declarations. Thus, in the Chandos case, Mr. Hasted, the author of the "History of Kent," was examined, to prove that in his conversations and correspondence with Mr. Bridges the father of the claimant, whilst compiling the history, the latter, in speaking of his own family, had never mentioned a syllable about his descent from the Chandos family.(o) The inference from such a fact is inevitable that he did not believe that he was so descended; it cannot be supposed that on such an occasion he would have failed to recount so important a chapter in the family history, if he had believed in its authenticity.

Numerous illustrations of the use which may be made of the \*conduct of individuals as evidence of pedigree, will [ \*708 ] be found in the former parts of this Treatise. In the case of the Leigh Peerage, much stress was laid on the alleged fact, that an ancestor of the claimant, in indigent circumstances, had once visited Lord Leigh, of which visit he used to boast among his neighbours, and that his lordship had given him a suit of clothing.(p)

In the Lovat Peerage case, there occurs a curious instance of hearsay evidence of a particular action, being given in confirmation of a pedigree. Three of the witnesses examined by the Scotch Judges, in confirmation of the fact that Thomas Frazer had a son, Alexander, deposed, that they had heard in the family, that this Alexander had killed a fiddler for playing a Highland air, named "Ha Pittack or Mac Thomash," which was generally reputed in the country to be made in derision of him.(q) The action may be viewed as an admission by the actor, that the appellation of "Mac Thomas," or "the son of Thomas," was truly applied to him.

Perhaps it would be difficult to find any class of cases which would better demonstrate the weight which the conduct of parties may have as evidence, than those in which it has mainly been relied on to rebut the presumption of legitimacy which the law raises, in favour of the issue of a married woman. The Banbury case, and the case of *Morris v. Davies*, cited at length in a former chapter,(r) are of this description. In both these cases, the concealment of the birth of a child from the husband, and the subsequent treatment of such child by the alleged father, were points of conduct mainly relied upon, to prove that the child was not the offspring of the husband, but of the adulterer.

A presumption may be drawn from the simple fact of intercourse, under circumstances assuming relationship, having taken place between

(o) Chandos Barony, Belts, 123.

(q) Lovat Barony, *Min. Ev.* pp. 10, 16, 18.

(p) *Min. Ev.* p. 298, et seq.

(r) *Sup.* p. 395.



two families: and proof of such intercourse will have a twofold operation; first, as laying a foundation for such presumption; and secondly, [ \*709 ] as displacing the contrary presumption \*which would arise from the absence of such intercourse, under circumstances where, between relatives, it would probably have taken place.(s)

The conduct of strangers may, in some cases, be admitted in proof of reputation; thus, the fact that persons living together as man and wife, were admitted to visit among families of respectability, has been considered good evidence that they were commonly reputed to be married.(t) Still, the value of this evidence is ultimately to be referred to the conduct of the parties themselves, upon which the general reputation must have been founded.

The devolution of property may be considered as on the footing of reputation. It is a tacit declaration by the members of the family, existing at the time, that he who succeeds is the heir or next of kin; and inferentially, that facts took place which led to his possession of that character. There is also a separate inference from the non-claim of nearer heirs or kindred, that none such existed. The difference between these two kinds of evidence is illustrated by Lord Eldon in the Chandos case.

The claimant deduced his descent from Edward Bridges, whom he alleged to be the son of Robert Bridges, an undoubted member of the Chandos family. Lady Asteley, the sister of Robert Bridges, died in 1646, when, according to the claimant's case, her nephew, Edward Bridges, was alive and *sui juris*. Yet letters of administration of her effects were granted to John Bridges as her first cousin and next of kin, after a suit in the Spiritual Court, in which he was opposed by the Countess of Exeter, who was only the second cousin of Lady Asteley. Lord Eldon remarks, that the claim by John Bridges had been set up as destructive of any evidence of reputation that there remained any descendants of Anthony Bridges, Lady Asteley's father. But if this was the inference, then the claim by the Countess of Exeter [ \*710 ] was equally \*destructive of the existence of reputation that there was in being a child of Richard, the father of John Bridges. Yet that John, the son of Richard, was then living, was not only established by himself in this suit, but it was not easy to imagine the fact unknown to Lady Exeter, for he continued to reside in the neighbourhood, whence living witnesses of his descent were taken. His Lordship contended, therefore, that the evidence of reputation could be little, if at all affected by this suit. Under these circumstances it was not the claim of John, but the non-claim of Edward which remained unaccountable.(u)

The circumstance of a party being sued as heir upon a bond, or his payment thereof, without being sued, is evidence as an admission of heirship. So of various other acts by which he conducts himself as heir.

The evidence of heirship, derivable from devolution of property,

(s) See per Lord Lyndhurst, *C. Lloyd v. Waite*, 1 Turn. & Phil. 67.

(t) *Say and Sele Barony*, Serjt. Hill's Collection, vol. 26, p. 169. *Beer v. Ward*, Printed Reports, p. 294. See sup. p. 247.

(u) Lord Eldon's Speech, D. P. 1803, privately printed, *penes auctorem*.

loses, under certain circumstances, something of its weight, by reason of the former state of the law in regard to adverse possession. The entry or possession of a younger brother, or other branch of the family, was not, until lately, considered adverse to the title of the heir, but as identical with it, and therefore the time of limitation did not run against the latter during such possession.<sup>(v)</sup> But by the 3 & 4 Wm. 4, c. 27, s. 18, it is enacted, that the possession of a younger brother, or other relation of the heir, shall not be deemed to be the possession of the heir himself. Still, however, before this statute, it is not to be presumed that heirs would suffer the property to be enjoyed by their relatives, even though their own title to the land should not thereby be affected. The entry, or the possession of the inheritance by one member of the family, must always be considered at least as *prima facie* evidence, not only that he comported himself as heir, and was considered such by those who were within the line of heirship, but also of the non-existence of \*those who, if living, would have been entitled to succeed. Since the statute this evidence is somewhat stronger. [ \*711 ]

As evidence from conduct is wholly presumptive, it is liable to be materially affected by circumstances. Thus, in the case of *Beer v. Ward*, the inference would have been much strengthened, if relatives of the settlor, prior in the line of descent, had been passed over in favour of the grandson. On the other hand, actions may be so accounted for as to destroy the inference to which they might otherwise naturally lead. It is obvious, that no legitimate argument can be founded on the behaviour of a person, with respect to a state of circumstances of which he was ignorant. In appealing to conduct, therefore, as evidence of belief, it will always be material to show that the actor was in possession of all requisite information.

<sup>(v)</sup> Co. Lit. s. 396, 242. Bul. N. P. 102. *Sharrington v. Stretton*, Flowl. 298. 306. 1 Chitty's Gen. Pr. 748.

## APPENDIX.

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[ \*712 ]

\*No. I.

3 & 4 Wm. 4, c. 106.

*An Act for the Amendment of the Law of Inheritance.*

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[ \*714 ]

\*No. II.

6 & 7 Wm. 4, c. 85.

*An Act for Marriages in England.*

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[ \*727 ]

\*No. III.

6 & 7 Wm. 4, c. 86.

*An Act for registering Births, Deaths, and Marriages in England.*  
[17th August, 1836.]

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[ \*742 ]

\*No. IV.

1 Vict. c. 22.

*An Act to explain and amend Two Acts passed in the last Session of Parliament, for Marriages, and for registering Births Deaths, and Marriages, in England.*

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[ \*749 ]

\*No. V.

1 & 2 Vict. c. 94.

*An Act for keeping safely the Public Records.*

\*No. VI. •

[ \*754 ]

3 & 4 Vict. c. 92.

*An Act for enabling Courts of Justice to admit Non-parochial Registers as Evidence of Births or Baptisms, Deaths or Burials, and Marriages.*

**NOTE.**—The foregoing Acts of Parliament are set out in the Appendix to the English edition, but the American publishers have omitted them, thinking that the profession would prefer other matter to them.

\*No. VII.

[ \*758 ]

*Presumption of Death.(a)*

The Roman law relative to the presumption of death, underwent some variations. By the Julian law(b) a five years' absence, or by a law of Constantine(c) a four years' absence was sufficient for the purpose of enabling the wife of a soldier to marry again. But Justinian decreed, that however long a period should elapse from his departure, the wife of a person engaged in an expedition should remain as she was, even though she should not receive any tidings or reply from her husband, unless she could prove his death by the oath of the tribune, or by the register of the cohort in which he served; in which case, after the lapse of one year, she might marry again.(d) Montesquieu censures this law for requiring positive where negative proof should have been sufficient, and for presuming a crime—the desertion of the husband—where it was so natural to presume his death.(e) The law obviously proceeded upon the policy of protecting men from injury by their absence on the imperial service.

In other cases, the centennial period, sanctioned by the code, has been generally followed down to modern times. Some civilians, however, and canonists hold the opinion, (*pro quâ*, says Swinburne, *facit Psalmus 89*.) that the presumption might be raised after the lapse of seventy years. This doctrine was attacked and defended with considerable acrimony; Vivius, a writer cited by Swinburne, calling Molinæus a heretic for differing from him on this point.(f)

In Scotland, the legal presumption of life ceases at the end of one hundred years, but it may be overcome in a shorter period by evidence either direct or presumptive, which is sufficient to warrant the inference of death. There is no fixed period, as in our law, during which absence, without tidings, will have this effect; but each [ \*759 ] case is determined by its own circumstances. In general, when the evidence is indirect, caution or security is required from

(a) Sup. p. 168.

(b) Dig. lib. 24, tit. 2, l. 6.

(c) Cod. lib. 5, tit. 17.

(d) Nov. 117, coll. 8, tit. 18, c. 11.

(e) Esprit des Loix, liv. 26, c. 9.

(f) Swinburne on Wills, part 6, s. 13.

the party relying upon the death to make restitution in case the fact shall prove to be otherwise.(g)

In the state of New York, the presumption of the duration of life is for the purpose of enabling a person to contract another marriage, reduced by statute to five years, if the party had not been heard of during that time; but the space of seven years is adopted for the more effectual discovery of the death of persons upon whose lives estates depend. In South Carolina, the latter period raises the presumption for the former purpose.(h)

By the French civil code,(i) a judicial declaration of absence may be obtained after four years from disappearance or the last tidings, unless the absentee should have left a procuration, when ten years must have elapsed. This entitles his heirs to enjoy his property, on giving security for the administration of it. If the absentee re-appear within fifteen years from disappearance, the provisional possessors must restore the fifth part of the revenues; if above fifteen and under thirty years, the tenth part; if above thirty years, the whole shall belong to them. When thirty years have elapsed from possession, or one hundred years from the birth of the absentee, the securities shall be discharged. But if the absentee re-appear, or his existence be proved at any time even after final possession, he shall recover his property in the state in which it shall then be, and his children or direct descendants are empowered to demand restitution within thirty years, to be computed from final possession.

Some of the oriental nations follow a singular rule in regard to this presumption. By the Mahommedan law of succession, the estate of a "lost person" is reserved until his death can be ascertained; or according to the clearer tradition, *when not one of his equals in age remains*, judgment may be given of his death. But other opinions fixed the term at periods varying from ninety to one hundred and twenty years from the day of birth.(j)

## NO. VIII.

### *Presumptions and indicia of Survivorship.(k)*

The civil law on this subject was not followed so closely as might be expected in those countries which made that compilation the basis of their jurisprudence. Besides age and sex the only grounds of the presumptions which it directs to be raised, the decisions of the Italian tribunals early established that several other circumstances were entitled to weight as *indicia* of survivorship. These may be resolved into the previous corporeal and mental condition of the *commorientes*, the state and position of the bodies, and the cause of death: where, however, there was a literal disregard of the Roman law, a conformity in spirit was claimed. Menochius introduces a case, with the remark, that when the digest prescribes that the child of the age of puberty shall

(g) See the cases collected, Tait on Evidence, 2nd edit. p. 463.

(h) Beak, p. 370.

(i) Liv. 1, tit. 4, c. 1, 2, 3.

(j) Mahommedan Law of Succession, Sir Wm. Jones's Works, vol. 3, p. 548.

(k) Sup. p. 186.

be presumed to have survived its parent, it assumes, in the particular case, what is generally true, that greater strength and energy will belong to the younger of two persons who shall have passed that age. But if it be proved that the advantage in this respect was inverted, the reason of the law failing, the law ought not to bind. And he then relates that where at Rome, in 1450, a year \*of jubilee, 500 persons [ \*760 ] perished by the fall of a bridge, and a question arose respecting the survivorship between two of the sufferers, a father and his daughter of the age of thirteen, (that is, one year above the age of puberty in females,) and it was proved that the father was robust, and the daughter in a weakly state, the presumption was adjudged to be in favour of the father.(l)

Two cases are mentioned by Zacchias, in which the decisions were according to the rules in the Digest. In one a mother and her infant were shipwrecked: in another a mother and her two young children were killed by lightning; in both the parent was held to have survived.(m)

The same writer was consulted by the judges in the following cases. A father aged sixty, and his son aged thirty, perished together with several other persons, by the fall of a building. The body of the father was found uninjured, that of the son with a severe wound on the head. The question of survivorship was agitated between the heirs of each. Zacchias reported his conclusion that the son survived; his wound was not necessarily mortal, nor calculated to destroy his strength immediately; suffocation was a more instant cause of death, and the father being in a valetudinarian state and of an advanced age, would be first destroyed by it.(n) A man and his wife having eaten poisonous mushrooms, expired before the return of the domestics, who had been sent to obtain assistance. Zacchias reported in favour of the husband's survivorship, on the grounds, that although sixty years of age, he was robust and healthy, and from the evidence of the servants, had eaten few of the mushrooms, whereas the wife, although only forty, was affected with asthma and other complaints, and was proved to have partaken largely of the poisonous food.(o)

The Digest provides, that if a father and his adult son perished together in battle, the latter shall be presumed the survivor;(p) and this presumption was followed in a remarkable French case. A father and his son fell at the battle of Dunes in 1658, and the daughter of the former became a nun, and civilly dead, on the same day at noon, which was the hour when the battle commenced. On the question of survivorship among the three, it was decided that the nun died first, on the ground, that her vows being voluntary, would be consummated in a moment; whereas the deaths of the father and son being violent, there was a possibility of their living after the receipt of their wounds. As between them, it was, after some argument, agreed to

(l) Menochius, lib. 6, pr. 50.

(m) Zacchias Questiones Medicolegales, lib. 5, tit. 2, qn. 12.

(n) Zacchias Consilium, 51. But the propriety of this opinion is questioned by Fodere and Beck, p. 359.

(o) Zacchias Consilium, 58.

(p) Dig. lib. 34, tit. 5, l. 9.

follow the Roman law, and to presume that the son being of the age of puberty had survived his father.(g)

The importance of the cause and manner of death with reference to the determination of these questions, is illustrated by the two cases following. In 1629 a mother, and her daughter aged four years, were drowned in the Loire. The Parliament of Paris, on appeal, decided that the youngest had died first. Some years afterwards, a mother and her two children, one aged twenty-two months, and the other eight years, were murdered secretly in the night. The husband claimed the property of his wife, on the supposition that the children had survived, and the Parliament of Paris adjudged it to him. The cases cease to be discrepant when it is recollected that murderers would, in all probability, first destroy those whom they most dreaded.(r)

In 1751 a merchant aged fifty-eight, his wife aged fifty, and his daughter aged twenty-seven, were drowned with many others, in [ \*761 ] crossing the Seine. The Parliament of Paris, in opposition to medical opinion that the daughter died first, which proceeded from the likelihood of her being in a state which would tend to accelerate death under the circumstances, admitted the presumption of her survivorship, and decreed accordingly.(s)

Where mother and child die in parturition without witnesses, it were reasonable to expect that some certain data for determining survivorship had been furnished by medical experience; but these will be looked for in vain. A case of this kind in which the fact having taken place some years before, the naked question was presented without evidence, came before the Imperial Chamber of Wetzlar, at the close of the seventeenth century. They decided, for physical reasons, (*causis physicis*;) that the mother had died first. Valentinus, who has preserved this case, says, "That undoubtedly these reasons were, 1, that the mother was exhausted by the labour; and 2, that the infant would not have died until deprived by the death of the mother of its nourishment." (t) This decision is supported by the authority of Menochius, (u) but Foderé, Beck, and other medical jurists question its correctness, and assign several reasons why the presumption should have been in favour of the mother. They admit, however, that in certain cases the contrary opinion will more probably be correct.(v) Of course, where an examination has been made, or facts attending the delivery are disclosed in evidence, a presumption either way would have little force.

In an American case, the mother and child died during delivery. If the former survived, her relatives were entitled to succeed to a large landed estate; if the child was the survivor, its father was by the law of that country its heir. On the trial, it appeared that the child was born alive, and the question of the priority of death was then decided against the parties claiming as heirs of the mother.(w)

(g) Ricard *Traité des Dispositions Conditionnelles*, c. 5, s. 5; Foderé, tom. 2, p. 220.

(r) *Causes Célèbres*, tom. 3, 412; Foderé, tom. 2, p. 218.

(s) Foderé, tom. 2, pp. 220, 316.

(t) *Pandectæ Medico-legales*, vol. 1; Cases 1; and *Introd.* p. 3.

(u) *Lib. 5, pres. 3.*

(v) Foderé, tom. 2, p. 94; Beck, p. 357.

(w) Beck, p. 358, communicated by the Honourable De Witt Clinton.

Of physiological indicia of survivorship, sanctioned by medical authority, it may be first observed, that where the case furnishes such evidence, an inference of the order of death may be made from the comparative rigidity of the bodies. But it should be borne in mind; that the bodies of young persons retain their heat longer after death than those of old, and that rigidity quickly follows death from loss of blood, but is slow in taking place after that from apoplexy and asphyxia.(z) It is asserted generally, that the more sudden the death the longer is this change delayed.(y)

It is said to be ascertained from numerous observations made for a long period on persons dead from the inhalation of carbonic acid gas, that the strongest die first, and that in particular the female adult survives the male adult.(z) So if death be caused by a deficiency of oxygen in atmospheric air, the adult in whom respiration is strongest, will perish sooner than infants or very young persons.(a) Dr. Beck remarks that the dreadful mortality in the Black Hole of Calcutta shews how rapidly this cause acts on the male in the vigour of life.(b)

According to Zacchias,(c) of persons destroyed by a fire those who are suffocated expire before those who are burnt. But he properly notes the importance of the situation in which the bodies are found relatively to each other, and to the commencement and progress of [ \*762 ] the fire. The position of the bodies is also material in deaths from noxious inhalation and other causes. Thus, where several persons were suffocated at Marseilles in the same house at night by the carbonic acid gas from a neighbouring lime-kiln, and the bodies were found in the morning some in bed, and others on the stairs; Foderé mentions that the position of the latter, giving evidence of an attempt to escape, afforded grounds for presuming that they survived the former.(d)

Dr. Beck affirms(e) that cold will soonest destroy the infant and the young, but he omits to notice the opinion of Zacchias(f) that very old persons from their deficiency of animal heat will be the first to suffer from this cause; an opinion which seems to receive confirmation from the fact already mentioned that after death the bodies of the old do not retain their heat so long as those of the young.(g)

On the other hand, where the cause of death is thirst or heat, both reason and experience dictate an inversion of the presumption in the civil law; the adult, in whom the function of perspiration is more active, should be supposed to perish before the young in whom it is less so. It is found that the former have repeatedly sunk under their sufferings from these causes, while the young have escaped.(h) Burckhardt mentions that when a caravan became deficient in water in the

(x) Beck, p. 504; Cyclop. of Med. vol. 3, pp. 101, 317.

(y) Paris and Fontl. vol. 3, p. 24.

(z) Annales D'Hygiène, tom. 10, p. 173.

(a) See Dr. Edwards on the influence of physical agents on life.

(b) Beck, p. 366; Horace Walpole relates an instance of the suffocation of several women from being shut up together in a round-house in London. Letters to Mann, vol. 1.

(c) Lib. 5, tit. 2, qu. 12. See also Smith's Forensic Medicine, p. 380, and Foderé, tom. 2, p. 238.

(d) Dict. des Sciences Med. Art. *Survie*. See also Sir Wm. Gell's account of the position of the skeletons of Pompeii.

(e) p. 366.

(f) Lib. 5, tit. 2, qu. 12.

(g) See supra, p. 361.

(h) Beck, p. 366.



Arabian desert "the youngest slaves bore the thirst better than the rest, and while the grown-up boys all died, the children reached Egypt in safety.(i) Foderé also relates that an Englishman and his daughter aged seven years, left Aleppo with a caravan in the year 1814, to cross the desert of Syria to the Persian Gulf; that both rode on camels and were similarly circumstanced in other respects; that the father died from the effects of the heat, while the girl completed the journey in safety. Other strong and robust members of the caravan suffered from the same cause: the young felt it least.(j)

With regard to deaths from famine, those to whom aliment performs the two-fold function of affording support and the means of growth are naturally most acutely sensible of its deprivation. Young persons, therefore, are found to yield soonest to this cause of death. Perhaps Zacchias refines too much upon the subject when he lays it down that of those dead from hunger the young should be supposed to have first perished, then infants, and lastly old persons; and that women survive men.(k) Colonel Napier relates that part of the British army in the Peninsula discovered in a house situated in an obscure part of the mountains, about thirty bodies of women and children who had died from starvation, and fifteen or sixteen survivors, of whom one only was a man. The author remarks, "The youngest had fallen first; all the children were dead."(l) The accounts of famines at sea and in besieged towns concur in proving that the young die of hunger before the old.(m)

If a knowledge of swimming was possessed by some only of several persons drowned together, that circumstance ought to weigh in favour of the presumption of their survivorship over their fellow sufferers ignorant of the art. Perhaps also, *\*ceteris paribus*, [ \*763 ] there should be a slight inclination to presume the survivorship of females, from the buoyancy of their dress, and of persons of a gross habit of body from their lesser specific gravity.(n)

Evidence of the state of health and bodily constitution of the *commorientes* is very material in these inquiries. It is reasonable to presume that invalids possessing less ability to resist the cause of death would perish before those in the vigour of health.(o) But the bodily condition of the deceased ought to be viewed in relation to that which fatally affected it; e. g. thoracic capacity, in death from the inhalation of noxious air. So, although persons of a gross habit may have the advantage of longer preservation from drowning, they will probably be the first to suffer most from other causes of suffocation.(p) It need

(i) Ibid.

(j) *Traité de Médecine légale*, tom. 2.

(k) Lib. 5, tit. 2, qu. 12; according to Dr. Beatty also, women are able to bear hunger better than men; *Cyclopædia of Medicine*, art. *Survivorship*.

(l) *History of the Peninsular War*, vol. 3, p. 457.

(m) See in particular, *Narrative of the loss of the Juno*, 1785. The conformity therefore to physical truth equals the pathos of the description in Dante of the death of Count Ugolino and his family, who being condemned to die by starvation in a dungeon, are represented as perishing in the order of age, the youngest first, the father the last survivor, having witnessed the death of all. *Inferno*, canto 33.

(n) See the arguments on the probabilities in the Stanwix case, *Fearne's Poeth. Works*, pp. 38, 39.

(o) That is, *ceteris paribus*. See *Taylor v. Diplock*, *sup.*, p. 192, and *Fearne's Poeth. Works*, pp. 38, 39.

(p) Dr. Beatty; *Cyclopædia of Med. art. Survivorship*; *Beck*, p. 365.

scarcely be mentioned that in many cases a *post mortem* examination will assist the formation of a correct opinion on the previous state of the deceased, and on the comparative rapidity of action of the cause of death.(q)

And the mental condition of the deceased, whether natural or the formation of their occupations or habits, is a proper subject of investigation.(q) "Fear," says a philosophical writer already quoted,(r) "is one of the most powerfully depressing affections of the mind, debilitating the brain and nervous system, producing languid action of the heart, and arresting the power of the muscles. Hence arises the impossibility of motion or of flying from approaching danger." He reasonably, therefore, ascribes to fear some influence in expediting the death of weak-minded, timid persons. And it not only produces inability to avoid danger, but accelerates death by increasing sensibility under situations of physical suffering. This was exemplified in the fate of 150 individuals who embarked on a raft after the wreck of the *Medusa*, in 1816, and were exposed to hunger during thirteen days. The fifteen who survived were not those who had been the most vigorous in body, but were the most courageous and strong-minded of the crew. And here it should be mentioned that from nervous agitation death will sometimes speedily follow slight wounds received in action,(s) and that, therefore, it may not be always correct to assume that the most severely wounded of men killed in battle perished first.

What has been said must be qualified by the observation, that it is difficult to argue from demeanour in ordinary life what the conduct of any one will be in an emergency, since the greatest courage and presence of mind is sometimes found, where previous observation has justified the least expectation of it. Foderé relates that in the revolutionary war he observed very young drummers, and even infants, conduct themselves with the greatest presence of mind and bravery in the most dangerous situations.(t)

It ought also to be recollected that there are many occasions, especially in war, in which death may be the consequence of intrepidity; wherefore the opinion of some jurists, notwithstanding the Digest, is that if father and son fell *in attack*, the son should be presumed to have died first, his valour being probably less tempered by discretion, than that of his parent.(u) Again, fear and weakness may in some cases contribute to longer or ultimate preservation. Thus females being liable to fainting and loss of sensation from objects of alarm, and being able to preserve life longer \*than males without marked arterial circulation, have sometimes survived men to whom [ \*764 ] the danger remained apparent, and the causes of it operative.(v)

To the above cases may be added the recent one of Sillick v. Booth,(w) in which two brothers having been lost at sea, one of the age of twenty-eight, and the other under twenty-one, without any cir-

(q) See the Judgment of Sir John Nicholl in *Taylor v. Diplock*, ubi. sup. *Fearn's Posth. Works*, pp. 38, 39. (r) Dr. Beatty *Cyclop. of Med. art. Survivorship*.

(s) *Cyclopedia of Med.* ubi. sup. This was the subject of a thesis by Dr. Burton at Edinburgh, 1820. (t) *Med. Leg.* tom. 2, p. 236. See *Cyclop. of Med.* vol. 3, p. 98.

(u) *Menochius*, lib. 6, pr. 50, n. 28.

(v) See *Cyclop. of Med. art. Survivorship*.

(w) 1 Y. & Col. C. C., p. 126.

cumstances to raise a presumption of survivorship, the master held that the elder, as the stronger and more experienced sailor, survived, and V. C. Knight Bruce approved of this decision.

## No. IX.

### *Presumption of death at a particular time within seven years.(x)*

In the case of *Sillick v. Booth*(y) it appeared that two seamen sailed from Demerara for England in a merchant vessel on the nineteenth of December, 1828. On the twenty-fourth of that month they touched at Dominica and were never afterwards heard of. The question was whether it could be presumed that they had perished before the twenty-fourth of January, 1829. Evidence of men conversant with the West Indies was given, shewing that the period between the first of August and the tenth of January is termed the hurricane months, and that premiums for insurance during that time are double what they are at other periods. On the other side, evidence was adduced that a ship which sailed twenty-five days after the missing vessel from the same port, had met with unusually calm weather for the first six weeks. Under these circumstances V. C. Knight Bruce held that it was to be presumed that the ship was lost before the twenty-fourth of January.

## No. X.

### *Marriage of the Clergy.(z)*

With respect to the secular clergy before the eleventh century, the rule seems to have fluctuated from the positive injunction of their marriage,(a) to its absolute prohibition, though perhaps the most prevalent state of things was that in which it was discouraged without being forbidden.(b) But in 1074, Pope Gregory VII. caused bishops to take an oath not to ordain married men, and the priests on their ordination to promise celibacy.(c) In England, Archbishop Lanfranc is said to have held a council against the marriage of priests in 1076; but according to Henry of Huntington, it was first forbidden in a council held at London in 1103, by Archbishop Anselm: "*In quo*," he says, "*prohibuit sacerdotibus Anglorum uxores, antea non prohibitas*." (d) There appears, however, to have been subsequently much indulgence shewn to a breach of the injunction, since we read of opprobrious epithets

(x) Sup. p. 185.

(y) 1 Y. & Col. C. C. p. 118.

(z) Sup. p. 268.

(a) And of more than the marriage, if Jerome represents *Vigilantius* correctly: "*et nisi episcopi pręgnantes uxores viderint clericorum, infantesque de ulnis matrum vagantes, Christi sacramenta non tribuunt*." *Jerom. adv. Vigilant.* This was in the fifth century, when ordination would tend to prove the existence rather than the failure of issue. Bishop Burnet says that in the Eastern Church priests were usually married before they were ordained. On the 32nd article.

(b) See on the early practice of the church Hey's *Norissian Lectures*, book 4, art. 32.

(c) Burnet on the 32nd Article; Fox's *Martyrology*, vol. 2, p. 453.

(d) And see *Spelman's Concilia*, 1, 29.

bestowed in England, in the twelfth century, upon married priests.(e) Henry I. is charged with having connived at the marriage of the clergy. It may be collected from a provincial constitution of Archbishop Wethershed, that marriage was forbidden to all the clerks above the office of subdeacon.(f) Neither in the constitutions of Otho and Othobon against concubinage in priests, nor in an act of 1 Hen. 7, c. 4, to punish priests for incontinency, is any mention made of their wives, from which it is inferred that there were no such.(g)

The marriage of priests is not among the propositions of Wickcliffe and Huss condemned at the Council of Constance.(h) It was recommended by the authority and example of Cranmer, and formed a subject of disagreement between him and Henry the 8th.(i) In 1538 that king issued a proclamation against the practice.(j) The third of the Six Articles was: "Priests may not marry by the law of God;" and the fourth was: "Vows of chastity or widowhood, by man or woman, made to God advisedly, ought to be observed by the law of God."(k) The stat. 31 Hen. 8, c. 6, enabling religious persons to sue and be sued, prohibited their marriage if they were priests, or had vowed religion at twenty-one years of age. And by the stat. 31 Hen. 8, c. 14, for enforcing the Six Articles, marriage in a priest or person who should vow chastity was made felony, and the marriages of such persons contracted previously to the act were annulled.(l)

But by stat. 2 & 3 Ed. 6, c. 21, all laws, canons, &c., prohibiting marriage to any ecclesiastical persons, and all penalties therein contained are made void, as well concerning marriages theretofore made, as such as thereafter should be celebrated. The stat. 5 & 6 Ed. 6, c. 12, recites that the former act had by many been considered permissive only of priests matrimony, as usury and other unlawful things were then permitted, and that the children of such marriages had been accounted bastards; and it therefore enacted that the matrimony of priests be adjudged just and lawful, and that all children born in such matrimony should be deemed and taken to be born in lawful matrimony, and to be legitimate and inheritable to lands, in like manner as the children born in lawful matrimony betwixt laymen. The act was not to alter any sentence of divorce theretofore made, nor the possession or inheritance of any lands or tenements then descended. Both of the last-mentioned acts were repealed by stat. 1 Mar. sess. 2, c. 2, and one of that Queen's injunctions to the bishops was "to remove all married clergymen from their wives," in consequence of which it is said that "all the married clergy throughout the kingdom were deprived."(m)

Queen Elizabeth is well known to have entertained her father's sentiments on this subject.(a) In the beginning of her reign an attempt

(e) Ibid. p. 483.

(f) Lyndwood, 128.

(g) Athon, 41, 92; Lyndwood, 39. Yet Collier, p. 262, says that the concubines of the clergy were for the most part their wives.

(h) It was afterwards asserted by the Confession of Augsburg. Hey's Norriassian Lectures book 4, art. 32.

(i) Burnet's Reformation.

(j) Strype's Cranmer, p. 69. See also p. 72.

(k) Frynne observes that persons who had made vows of chastity without becoming professed, could not marry by the canon law. Records, vol. 2. See Index, tit. Marriage.

(l) See also 33 Hen. 8, c. 29; 37 Hen. 8, c. 17.

(m) Neal's History of the Puritans, vol. 1, p. 60; Fox, vol. 1, p. 36.

(a) Strype's Life of Archbishop Parker, p. 107; Neal's History of the Puritans, 1, 117.

was made to repeal the stat. of Mary; "but," says Strype, "the Queen would not be brought so far to countenance the conjugal state of the clergy. This troubled not a little the divines, especially such as were married, as was Dr. Sandys, and Dr. Parker. Of this matter Sandys speaks in a letter to Parker: 'No law was made concerning the marriage of priests, but it is left as it were *in medio*. The Queen would wink at it, but not establish it by law; which is nothing else but to *bastard* our children.' The inconvenience hereof was that the clergy were fain to get their children legitimated: so I find did Parker his son Matthew."\*(a) It is, however, ordered by one of the injunctions \*of 1559, that no priest shall marry without the consent of his bishop, of two neighbouring justices, and of the woman's parents—if no parents, of her relations; if no relations, of her master or mistress.(o) The 32nd of the 39 Articles which were passed in convocation, and confirmed by the Queen in 1562, and again ratified in 1571, declares it to be lawful for the clergy to marry at their own discretion. The inefficiency of this article, and of the injunction of 1559, to legalize priests' marriages can hardly be questioned, when it is recollected that the severe enactments of Henry 8th remained unrepealed. Yet the law seems to have continued in this unsatisfactory state during the whole of the reign of Elizabeth. The stat. 1 Jac. 1, c. 25, s. 50, at length revived the acts of Edward 6, by repealing the stat. of Mary, which had repealed them.

The regular clergy were altogether incapacitated to contract marriage, by reason of their vows in regard to ecclesiastical jurisdiction,(p) and by reason of their constructive death in regard to any question in the civil courts.(q) The distinction was taken that the Pope might allow of the marriage of secular clerks, which was forbidden only by ecclesiastical law, but he could not dispense with the vows of the professed, the performance of which was *de jure divino*.(r) Thus Pope Innocent the 3rd is said to have admitted that the observance of chastity did so cleave to the bones of the monks, that to dispense with it was beyond his power. It was, however, conceded in the discussions at the Council of Trent, that as a thing consecrated cannot, whilst it remains so, be employed in human uses, but the consecration being removed, it may lawfully return to a promiscuous use; so a man consecrated to religion and remaining so, cannot marry, but the consecration being removed, he may, without any hindrance, do as others do.(s) This removal of consecration was what Littleton(t) calls the *derainment* or deprivation of a monk which restored him to civil life.

(a) Strype's Annals, p. 81. Parker's wife is called in deeds made whilst he was Archbishop, *Parker, alias Harleston*, (her maiden name,) and after her death her brother is called her heir at law, though she left children, whom her husband, who survived her, afterwards procured to be legitimated; according to Strype (Life, 511), by letters of legitimation, but, according to other contemporary authorities, by act of parliament, which was of course the only operative mode of conferring inheritable capacity. Other ecclesiastics followed Parker's example. Strype Annals, 8, and see 1 Hallam Const. Hist. 236, n.

(o) Sparrow's Colln. 76; Somers's Tracts, 1, 65.

(p) Paul's Hist. Conc. Trid. lib. 7.

(q) Co. Litt. 136 a. *Monachus presumitur mortuus quoad matrimonium. Accusatus Gloss. verb testes, de monach.*

(r) Paul's Hist. ubi sup.

(s) See however 3 Rep. 74.

(t) S. 202.

In this country the marriages of the secular clergy were on the footing of incestuous marriages, that is, voidable by sentence of divorce in the lifetime of both parties; but those of the regular clergy were void.(u) In the 2nd Elizabeth the widow of a priest recovered her dower.(v) It should, however, be mentioned that in the course of the discussions upon the canon against the marriage of priests in the Council of Trent, it was stated that the usage of antiquity was that if a priest did marry, his marriage was good, though he was thereby separated from the ministry; but that Pope Innocent the 2nd (who died in 1143,) first ordained that the marriage should be null.(w)

The 9th canon, agreed to in the 24th session of the Council of Trent (and which, it is presumed, proves the present law and practice of the Church of Rome,) anathematizes those who shall say that churchmen in holy orders, or regulars who have solemnly professed chastity may contract marriage, or that when it is contracted it is good and valid, any ecclesiastical law or vow which they have made to the contrary notwithstanding.(x)

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\*No. XI.

[ \*767 ]

*Regina v. Millis.*(y)

An important case, involving the question of the effect of a marriage celebrated without clerical ministration before Lord Hardwicke's act, has recently come before the House of Lords. The question arose upon the trial of an indictment for bigamy at the spring assizes (1842) for the County of Antrim. The jurors, by special verdict, found, "That in January, 1829, the prisoner, George Millis, accompanied by Esther Graham, spinster, and three other persons, went to the house of the Rev. John Johnstone, of Banbridge, in the county of Down, the placed and regular minister of the congregation of Protestant dissenters, commonly called Presbyterians; and that the said George Millis and Esther Graham entered into a contract of present marriage in the presence of the said Rev. John Johnstone, and the said other persons; and the said Rev. John Johnstone performed a religious ceremony of marriage between the said George Millis and Esther Graham according to the usual forms of the Presbyterian Church in Ireland; and that, after the said contract and ceremony, the prisoner and the said Esther for two years cohabited and lived together as man and wife, the said Esther being after the period of the said ceremony known by the name of Millis." It was further found that Millis was at the time a member of the Established Church of England and Ireland, and that Esther Graham was not a Roman Catholic, but whether a member of the said Established Church, or a Protestant dissenter was uncertain. On the twenty-fourth December, 1836, Millis was married to Jane Kennedy, then spinster, in the parish church of Stoke, in Devonshire,

(u) Co. Litt. 136 a; 2 Inst. 687; 12 Rep. 9; 1 Roll. Ab. 340.

(v) Dyer, 185, b.

(w) Father Paul's History of the Council of Trent, 1676, p. 635.

(x) Dupin's Eccl. Hist. lib. 4, c. 20.

(y) Sup. p. 296.

according to the forms of the Established Church, by the officiating minister of the said parish, he being a priest in holy orders; and, on the second September, 1841, Millis was taken in custody at Belfast on the above charge. Upon the argument which took place before the Court of Queen's Bench, the Judges were equally divided in opinion; but one of the Judges, with a view to the case being brought before the House of Lords, gave judgment, *pro formâ*, in favour of the prisoner. A writ of error to the House of Lords was thereupon brought by the crown. The following questions were submitted to the judges by the Lord Chancellor:

"A. and B. entered into a present contract of marriage, *per verba de præsenti* in Ireland, in the house and in the presence of a placed and regular minister of the congregation of the Protestant dissenters, called Presbyterians; A. was a member of the Established Church of England and Ireland; B. was not a Roman Catholic, but either a member of the Established Church or a Protestant dissenter. A religious ceremony of marriage was performed on the occasion by the said minister between the parties, according to the usual form of the Presbyterian Church in Ireland. A. and B. after the said contract and ceremony, cohabited and lived together for two years as man and wife. A. afterwards, and while B. was living, married C. in England. Did A. by the marriage in England commit the crime of bigamy?"

"A. and B. entered into a contract *per verba de præsenti* in Ireland, in the presence of a layman, no other person being present. Do these circumstances constitute a valid and binding marriage?"

The case was very fully argued in the presence of the Judges of the Courts of Common Law by Sir F. Pollock, A. G., and Sir W. Follet, S. G., for the plaintiff in error, and by Pemberton, Q. C., and Kinderley, Q. C., for the defendant in error.

Chief Justice Tindal, in delivering the unanimous opinion of the Judges, stated \*that by the law of England, as it existed [ \*768 ] at the time of the passing of the Marriage Act, a contract of marriage *per verba de præsenti*, was a contract indissoluble between the parties themselves, affording to either of the contracting parties by application to the Spiritual Court, the power of compelling the solemnization of an actual marriage; but that such a contract never constituted a full and complete marriage in itself, unless made in the presence and with the intervention of a minister in holy orders.

Lord Abinger concurred in opinion with the learned Judges; but Lords Brougham, Campbell, and Denman, C. J., differed from them.

In February, 1844, Lord Lyndhurst and Lord Cottenham severally reviewed the authorities at length, and expressed opinions agreeing with that delivered by Chief Justice Tindal.

The further consideration of the case was then adjourned.

## No. XII.

*Interrogatories to prove a Marriage at Hamburg by Register, and reputation, and Legitimacy of Children.(2)*

1. Do you know, &c.

2. Whether or not are you now and were you in the month of June, 1799, a clergyman in full orders of the Church of England? Were you or not then resident in the free city of Hamburg, and in what character or capacity did you reside there? Was or not the above named defendant S. L. Nevill married at Hamburg aforesaid and to whom, during your residence there? By whom, and in what place in Hamburg, aforesaid was the said marriage solemnized, and whether or not according to the rites and ceremonies of the Church of England? Were or was not any, and what children or child of the said marriage afterwards born at Hamburg aforesaid, and whether or not baptized there, and in what place, and who officiated at the baptisms, or baptism, of any such children, or child? Whether or not did the said wife of the said defendant, S. L. Nevill, afterwards die, and when, and where, and who officiated at her burial? Declare, &c.

3. Whether or not by the laws of the City of Hamburg, or by any and what regulation or authority there, is any register required to be made and kept of marriages, births, and baptisms, and deaths, and burials, or of any, and which of such occurrences happening within the said city, or the limits and precincts thereof? By whom is such register required to be made, and by whom, and in what place kept or deposited? Look upon the several paper writings now produced and shewn to you, at this the time of your examination, marked respectively with the letters A. B. C.: are or is or not the same, or any, or either, and which of them true copies, or a true copy of any registers or register, made and kept, and deposited at Hamburg aforesaid, in compliance with the laws, or regulations, or authority there existing in that behalf? Where and by whom, are, or is the original registers or original register, of which the said produced paper writings, or any, or either, and which of them purport, or purports to be copies, or a copy, deposited and kept? Have you or not carefully examined and compared the said produced paper writings, or any, or either, and which of them with such original registers or register. Declare, &c.

4. Whether or not has the above-named defendant S. L. N., during any and what part of the time that you have known him been married, and reputed to be married, and whether or not married, or reputed to be married more than once? \*What were the christian and maiden names of the first wife, or reputed wife [ \*769 ] of the said defendant? Is she living or dead, and if dead, when and where did she die? Did she or not for and during what period, and whether or not until and at the time of her death, live with the said defendant, and was she or not at all times, and by all persons during such period acknowledged, treated, and received as the wife of the said defendant, S. L. N.? Is the second wife, or reputed wife of the said S. L. N. living or dead, and if dead when and where did she die?



Are or not the above named plaintiffs Sandford Neville, Arabella Joanna Clay, and Cavendish Neville the legitimate children of the said S. L. N. by his said wives, or one and which of them, as you by any and what means know, or for any and what reason believe? Whether or not are the said plaintiffs the only children of the said defendant S. L. N., or has the said defendant had issue, any and what other legitimate children or child? Are or is or not such other children or child now living or dead, and if dead at what ages or age did such children respectively, or did such child die? Declare, &c.

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### No. XIII.

#### *Proof of Death by certified copy of Register under 6 & 7 Wm. 4, c. 86.(a)*

In the Attorney-General v. Culverwell, 26th Feb. 1844, the Master of the Rolls held that a certificate of death from the General Register Office was not sufficient evidence for him to act upon, in directing payment of money to a party whose title depended on the death of the party to whom the evidence related. His Lordship said it was not the best evidence, and he required the certificate of burial. This case was mentioned to V. C. Knight Bruce, in the case of Leach v. Leach, 2nd March 1844, when his Honour refused to act upon a certified copy of the registry of death, in ordering payment out of Court of a sum of money to the administrator of a party to whom it had been declared to belong absolutely. He considered, that neither the letters of administration, which were produced, nor the copy of the registry were sufficient evidence of death, and he required an affidavit of that fact.

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### No. XIV.(b)

In confirmation of the view which has been taken, that in equity, stronger proof of failure of issue will be required than in ejectment, a case may be cited, of Watson v. England, V. C. E., 22nd Feb. 1844. This case came before the Court on exceptions to the Master's report, finding that Mary Bilton died without issue. The evidence was, that when a girl of sixteen, she left her home in the year 1810, and that nothing had since been heard of her, except a letter, dated from Portsmouth, in the year 1814, in which she said that she had been witnessing a sham fight there, got up for the amusement of the allied sovereigns, then in England, and that she intended to go abroad. Although thirty years had elapsed since that time, the Vice Chancellor of England held the evidence insufficient to warrant the presumption of death without issue, and allowed the exception, sending it back to the Master to review his report, with liberty to issue such advertisements as he should think fit.

(a) Sup. pp. 160, 477.

(b) Sup. p. 203.

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**THE LAWS**  
**RELATING TO**  
**FACTORS AND BROKERS.**

**JUNE, 1845.—24**



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A  
TREATISE  
ON  
*The Law*  
RELATING TO  
FACTORS AND BROKERS.

BY JOHN A. RUSSELL, B.A.,  
OF GRAY'S INN, BARRISTER-AT-LAW.

---

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## P R E F A C E.

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WHEN the last "Factors' Act" was passed, it occurred to the Author that an edition of that and the other statutes having reference to the same subject—combining the cases which had been decided thereon—might be useful, and that, therefore, it would not be unacceptable to his professional brethren. Under this impression, he was induced to examine, at some length, the various authorities which treat of the laws of agency in general,—chiefly for the purpose of collating therefrom the past and present state of the law as to the factor's power to pledge; and it was whilst thus engaged, that the idea of producing the following pages first suggested itself to him. The simple fact, that the powers and rights of factors had so often engaged the attention of the legislature, sufficiently convinced the Author of the importance attached to the functions of that class of agents; and the many peculiar principles which, on looking into the books, he found laid down as being particularly applicable to them, apart from other agents, led him to believe, that the laws by which they were governed in their professional capacity were sufficiently distinctive in character, to admit of their being properly treated as a separate branch of the commercial-law. Under this belief the present work was commenced; and it is in the hope that the profession will concur with him in this belief, that the Author now presents to them the result of his labours.

The plan of the work is as follows. The *first* chapter treats of the nature of the employment of factors and brokers, of the persons who are qualified to fill those offices, and of the modes in which they may be appointed. The *second* chapter treats of their duties and powers; the *third*, of their rights and liabilities; and the *fourth*, of the means by which the relation subsisting between them and the principal may be dissolved. In pursuing this plan, the Author has endeavoured, to the best of his ability, to trace clearly and succinctly the nature and consequences of this relationship, from its commencement to its close; and he ventures to express a hope that he has, at least in some measure, succeeded in so doing. At the same time, however, he is conscious that there may be errors, both in the arrangement of the subject and in his mode of treating it, which have escaped him, and for an excuse for which he must wholly rely on the indulgence of those who may honour him by a perusal of his work.

In conclusion the author begs to state, that in citing his authorities he has not confined himself exclusively to the decisions and *dicta* of the lawyers of this country; but that he has, wherever it appeared to him that he could do so with advantage, availed himself of the opinions of the eminent jurists of other countries, and particularly of those of Mr. Bell, Pothier, and Dr. Story. It is allowed by all, that the opinions of such men on all questions of commercial-law cannot be too highly valued; and the Author is confident, that this fact will be admitted fully to justify the frequent reference which he has made to them.

1, CHILD'S PLACE, TEMPLE.  
1st January, 1844.

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A

# TREATISE ON THE LAWS

RELATING TO

## FACTORS AND BROKERS.

### CHAPTER I.

NATURE OF THE EMPLOYMENT OF FACTORS AND BROKERS ; WHO MAY BE,  
AND HOW APPOINTED.

A **FACTOR**, or Commission Merchant, is an agent to whom goods are consigned or delivered for sale by or for a merchant or other person residing abroad, or at a distance from the place of sale, and who, in return for his trouble, receives a compensation, commonly called factorage or commission.(a) Factors, however, are sometimes the ostensible vendors of property belonging to merchants resident in the same place ; and sometimes the same factor acts both for buyer and seller, the sale being perfected, and the property transferred, by the delivery of bills for the price, and by an entry being made in the factor's books to the debit of the one party, and the credit of the other.(b)

\*There are two kinds of factors, namely, *home factors*, [ \*2 ] and *foreign*. With us, a man is called a *home factor*, when both he and his principal reside in this country ; whilst, on the other hand, a *foreign factor* is said to be one who, whether residing in England or abroad, is commissioned by a principal belonging to a different state or country from that in which the factor himself resides.(c)

The rate of commission to which a factor is entitled, depends on the terms he makes with his principal ; or, in the absence of any agreement, on the usage of the place where he resides, or the business he transacts ;(d) and such commission may amount either to

(a) Com. Dig. *Merchant*, B. ; *Baring v. Corrie*, 2 B. & Al. 143.

(b) 1 Bell. Com. on Merc. Jur. 386.

(c) *Ibid.* ; 3 Chitty on Com. and Man. 193, 194. The definitions in the text will apply to all classes of factors, without reference to the particular business in which they act, except one, viz., *supercargoes*. These, however, are only *quasi factors* (Beawes, *Lex Merc.* 47) ; possessing, indeed, the character of factors, inasmuch as they are general agents to purchase goods with the proceeds of cargoes consigned to them ; but differing from it in this, that they usually go out and return home with the ships on board of which such cargoes are embarked. (*Ibid.* ; *Davidson v. Gwynne*, 12 East, 381. 396.)

(d) Beawes, *Lex Merc.* 41.

a mere salary or allowance for his care, or it may be what is called a commission *del credere*; the difference between the two cases being, that in the latter the factor agrees for an additional compensation, to guarantee to his principal, in case of sale, the debt due from the buyer, which in the former he does not; and the commission *del credere* being the premium or price given by the principal to the factor for such guarantee.(e)

The term Broker has been variously defined. By the 1 Jac. 1, c. 21, brokers are described to be;—persons employed by “merchants English and merchants strangers in contriving, making, and concluding bargains and contracts between them concerning their wares and [ \*3 ] merchandizes, \*and moneys to be taken up by exchange between such merchant and merchants, and tradesmen.” Chief Baron Comyn again describes them as “persons employed among merchants to make contracts between them, and to fix the exchange for payment of wares sold or bought;”(f) and lastly, in the case of *Wilkes v. Elliss*,(g) a distinction was taken between a person employed to make public bargains, and one whose business it was to make private bargains only; and it was stated in the argument for the defendant in that case, on the authority of Cowel’s Interpreter, that the latter was the true definition of a broker.(h)

Each of these definitions however must, at the present day, be regarded as somewhat too limited. By the two former, for instance, the employment of brokers is confined entirely to dealings between merchant and merchant; a description which, it will at once be seen, would exclude stockbrokers, a class most extensively engaged on behalf of persons not merchants; and by the last, they are described to be persons engaged in making private bargains only; a limitation which would equally exclude those of them who are in the habit of attending public sales, such as the sales of the East India Company, and who, whilst acting in that capacity, can scarcely be said to enter into none but private contracts.

The following definition is perhaps less liable to objection, namely, that a broker is an agent employed among merchants and others to [ \*4 ] make contracts between them in \*matters of trade, commerce, or navigation, for a commission commonly called brokerage;(i) and his character differs from that of a factor in the following particulars. A factor, as we shall hereafter see, may buy and sell either in his own name or in that of his principal. A broker must in general contract in the name of the latter. A factor has the possession, management, and control of all goods which he buys or sells for his principal; a broker, on the contrary, is not intrusted

(e) *Morris v. Cleasby*, 4 M. & Sel. 574.

(f) *Com. Dig. Merchant, C.*

(g) 2 H. Bl. 555.

(h) The distinction was taken in the case cited, for the purpose of showing that a broker was essentially different from an auctioneer, whose business it was, among other things, to make contracts of sale publicly. No opinion, however, was given on the question; but the learned reporter states, that “the Court seemed disposed to be of opinion in favour of the defendant;” and as he makes no mention of any objection having been taken to the distinction, it becomes, on that account, at least worthy of notice, especially as upon it the question of a broker’s liability under certain statutes to be hereafter mentioned, might in some measure depend.

(i) See Story on Agency, § 28, and the authorities cited above.

with the possession of what he is employed to sell, nor is he empowered to obtain possession of what he is employed to purchase; but he acts merely as a middle-man, or negociator between the parties.(j) Indeed, a broker is very properly described by Domat as being a person empowered, not to treat, but to explain the intentions of both parties; and so to negotiate as to put those who employ him in a condition to treat together personally.(k) In those cases therefore in which a broker is intrusted with policies of insurance, or with negotiable securities indorsed in blank and for sale, he becomes rather a factor than a broker; and where the two characters are thus combined, a distinction must be made between the acts of the agent in the one and in the other, as the same rules would not always apply to each.

Contracts of sale and purchase are usually effected by brokers by the delivery to their principals of what are called bought-and-sold notes. These notes should contain the names of both the contracting parties,(l) the quantity of the article bought or sold, and the price.(m) They should also correspond with each other;(n) and if any material alteration be made therein without the consent of the party sought to be charged, the contract will, as against [ \*5 ] him, be avoided.(o) A mistake however in both notes as to the name of the seller will not vitiate the contract, provided neither party has been prejudiced thereby;(p) and parol evidence is admissible to explain variances which occur in these instruments; so that if, when so explained, both are found to mean substantially the same thing, the contract will not be avoided.(q) These notes, moreover, it is said, constitute the original contract, and are the proper evidence thereof;(r) and they are admissible for this purpose, although the entry in the broker's book has never been signed by him.(s) It has however been recently questioned whether they are the only evidence of the contract; and indeed one learned judge has expressed himself to be very strongly of opinion, that if the bought-and-sold notes disagree, and there be a memorandum in the broker's book, made according to the intention of the parties, that memorandum, signed by the broker, would be good evidence to satisfy the statute of frauds.(t)

The amount of commission to which a broker is entitled has in some instances been regulated by act of parliament. Thus by the 10 Anne, c. 19, s. 121, brokers are subjected to a penalty of 20*l*. for taking more than 2*s*. 9*d*. per cent. for buying or selling of any tallies, orders, exchequer bills, exchequer tickets, bank bills, or any share or interest in any

(j) *Baring v. Corrie*, 2 B. & AL 143; 2 Park on Mar. Insur. 801, 8th edit.

(k) Domat, B. 1, Tit. 17, s. 1.

(l) *Champion v. Plummer*, 1 Bos. & Pul. N. R. 252; *Graham v. Musson*, 7 Scott, 769; *Graham v. Fretwell*, 4 Scott, N. R. 25.

(m) *Elmore v. Kingscote*, 5 B. & C. 583, (12 E. C. L. R.)

(n) *Cumming v. Roebuck*, Holt, N. P. C. 172, (3 E. C. L. R.); *Grant v. Fletcher*, 5 B. & C. 436, (11 E. C. L. R.)

(o) *Powell v. Divett*, 15 East, 29.

(p) *Mitchell v. Lapege*, Holt, N. P. C. 253, (3 E. C. L. R.)

(q) *Bold v. Rayner*, 1 M. & W. 343.

(r) *Thornton v. Meux*, M. & M. 43, (22 E. C. L. R.); *Hawes v. Forster*, 1 M. Rob. 368.

(s) *Goom v. Affalo*, 6 B. & C. 117, (13 E. C. L. R.)

(t) *Per Parke, B., Thornton v. Charles*, 9 M. & W. 802. 808.(\*)



joint stock created by act of parliament, or by letters-patent under the great seal, or bonds of any company thereby erected. So by the [ \*6 ] 12 Anne, stat. 2, c. 16, the commission \*of brokers "for procuring the loan or forbearing of any sum or sums of money" is limited to "five shillings for the loan or forbearing of 100*l.* for a year, and so ratably;" and to "twelve pence over and above the stamp duties for making or renewing of the bond or bill for loan, or forbearing thereof;" and in like manner the 53 Geo. 3, c. 141, s. 9, allows only 10*s.* per cent. to a broker for procuring a loan upon an annuity. But these statutes do not restrain brokers from taking larger commission in other cases; and therefore where they do not apply, a broker may regulate the amount of his commission by agreement with his principal; or, in the absence of any agreement, it must depend on the custom of trade.(*u*)

Brokers, like factors, may be retained under a commission *del credere*, and the effect of such commission is the same in both cases.(*x*)

It is a general principle of the common law, that all persons are capable of acting as agents who are of sound mind, and who have no interest or employment adverse to that of their principals.(*y*) The reason of this is said to be, that the office of agent is merely ministerial; and that the execution of a naked authority is not necessarily attended with any advantage to those whom the law regards as not being *sui juris*, (such as minors, aliens, persons outlawed, &c.,) nor to any other person who, by law, might claim an interest under them.(*z*) This maxim however will not apply, except in a limited sense, to the case of factors or brokers. Their authority,—although it may be strictly speaking a mere naked authority,(*a*)—is nevertheless one from the execution of which many rights and liabilities arise,

[ \*7 ] which cannot be enforced either by or against any person who \*labours under a legal incapacity. The principal, it is true, would be bound by, and could take advantage of the contract of such a person,—so far that is, as third parties were concerned. But here the capacity of the agent would cease; and hence, although for the mere purpose of making contracts for his employer, a person might be competent to act as a factor or broker notwithstanding he were affected by a legal disability;—still it follows, that if he were so affected, he could not possess all the incidents belonging to, and therefore could not properly assume either of those characters.(*b*)

Brokers who act as such within the city of London or the liberties thereof, require a peculiar qualification, namely,—that they should be previously licensed by the Court of Mayor and Aldermen. This

(*u*) *Brown v. Nairne*, 9 C. & P. 204, (38 E. C. L. R.)

(*x*) 1 Bell, Com. on Merc. Jur. 289; 2 Park. on Insur. 801.

(*y*) Co. Litt. 52, A.; Story, Com. on Agency, § 9.

(*z*) Bac. Ab. Authority, B.; 3 Chitty on Com. & Man. 194.

(*a*) See Com. Dig. Attorney, C. 9, 10.

(*b*) The point mentioned in the text is one not very likely to occur in practice; but as it appears to be by no means an unimportant limitation of the general rule of law with reference to the capacity of agents, it is hoped that it will, notwithstanding, be deemed worthy of notice. Since the paragraph in the text was written, the author has discovered that Dr. Story takes the same distinction; Com. on the Law of Bail. § 162; and that it likewise forms the subject of an article in the civil code of France. Cod. Civil. art. 1990.

regulation is founded on the statute 6 Anne, c. 16, s. 4, whereby it is enacted: "That all brokers who shall act as brokers within the city of London and liberties thereof shall, from time to time, be admitted so to do by the Court of Mayor and Aldermen of the said city for the time being, under such restrictions and limitations for their honest and good behaviour as that Court shall think fit and reasonable;" and the fifth section of the same statute provides, "that if any person shall take upon him to act as a broker, or employ any other under him to act as such within the said city and liberties not being admitted as aforesaid, every such person so offending shall forfeit and pay to the use of the said mayor and commonalty and citizens of the said city for every such offence the sum of 25*l.*, to be recovered by action of debt in the name of the \*chamberlain of the said city." [ \*8 ]

By the 57 Geo. 3, c. 60, this penalty is increased to 100*l.* [ \*8 ]

In pursuance of the former of these statutes, the Court of Mayor and Aldermen of the city of London made, in the year 1708, and afterwards in the year 1818, certain rules and regulations for the admission and government of brokers, which are still in force. According to these regulations, it is requisite for every person before being admitted to act as a broker in London, to enter into a bond to the mayor, commonalty and citizens, in a penalty of 1000*l.*, with two sureties for 250*l.* each; and also to take an oath, "truly and faithfully to execute and perform the office and employment of a broker,"—the form of which oath is prescribed by those regulations. The condition of the above bond provides for the broker's good conduct in the execution of his office, and, to a certain extent, defines his powers and duties in the making of contracts in the way of his calling. It likewise repeats the proviso contained in the fifth section of the stat. 6 Anne, c. 16, against a broker employing "any person under him to act as a broker within the said city and liberties thereof not being duly admitted as aforesaid;" but this proviso, it appears, applies only to cases in which an admitted broker can be said strictly, to have employed an unqualified person "to act *under him*;" and therefore, where two persons had been engaged in making certain contracts for the sale of goods, only one of whom was an admitted broker, but it was shown that in making the contracts in question, both had acted with concurrent and equal authority, the court were of opinion that such a case as this was not provided against by the bond.(c)

\*Various questions have arisen on the construction of the above statutes, both as to the class of persons whom they [ \*9 ]

(c) *Mayor of London v. Brandon*, Holt's N. P. C. 438, (8 E. C. L. R.) The circumstances of the case were as follow. An action was brought against the defendant, a sworn broker of the city of London, upon the bond given by him on being admitted to that privilege. Several breaches were assigned, one of which was, that the defendant "had allowed his brother to act under him as a broker, and to make contracts in his own name." At the trial before Lord Ellenborough three witnesses were called, who produced several contracts for tobacco, made out and signed by the defendant and by his brother, J. B.: but none of the witnesses could swear that they had negotiated with J. B. only; they agreed that the business was transacted by both of them indifferently together. And upon this evidence his lordship "thought, that the conduct of the defendant and his brother, could not be brought within the precise terms of the bond. It could not be said that J. B. acted *under* the defendant, for they seemed to have a concurrent and equal authority." The plaintiff was accordingly nonsuited; and the court, on motion made to set aside the nonsuit, refused a rule, and unanimously approved of the opinion expressed by his lordship at the trial.

were intended to affect, and as to the mode in which such persons are affected by them. On the former of these questions it has been held, that a stock-broker is a broker within the meaning of the statute of Anne, and liable to the penalty imposed by the 57 Geo. 3, c. 60, for acting as a broker in London without having been duly admitted. (d) But it would appear that an auctioneer is not a broker, so as to render him liable to the penalties imposed by the above statutes; (e) that a ship-broker is not so liable; (f) and in the case of *Jansen v. Green*, (g) it was intimated by Lord Mansfield, that the exemption might also be taken to extend to the case of a merchant who acts by commission from a correspondent abroad. Indeed some of the expressions attributed to the judges in the report of that case, are calculated to create a doubt, as to whether they thought that the statute of Anne was intended to apply to any other than brokers who negotiate contracts respecting "public or joint stocks or other public securities;" but be this as it may, it is clear, that the courts will in no case subject a party to the penalties imposed by the above statute, unless they are satisfied that he comes within their letter, as well as their spirit. (h)

[ \*10 ] \*The second class of questions which we mentioned as having arisen under these statutes, will be more properly considered, when we come to treat of the rights of the parties to whom they apply.

A qualification very similar to that prescribed by the statute of Anne, is likewise required of all persons who act as custom-house brokers in the port of London. This is regulated by the statute 3 & 4 W. 4, c. 52, s. 144, whereby it is enacted: "That it shall not be lawful for any person to act as an agent for transacting business at the custom-house in the port of London which shall relate to the entry or clearance of any ship, or of any goods, or of any baggage, unless authorized so to do by license of the commissioners of his majesty's customs." Such commissioners are likewise empowered, by the same section, to require a bond, with one sufficient surety in the sum of 1000*l.*, to be given by every person to whom such license shall be granted, for the faithful conduct of himself and his clerks whilst acting under the said license; "provided always, that such bond shall not be required of any person who shall be one of the sworn brokers of the city of London."

Let us now consider how, and by whom, a factor or broker may be appointed.

A factor or broker may be appointed, either, *first*, by a formal instrument under seal, as by power of attorney; or, *secondly*, by letter of instructions; or, *thirdly*, he may be appointed by mere words; or, *lastly*, when there has been no actual appointment, third persons may presume its existence, provided the principal has on former occasions employed, or if he has previously adopted the acts and dealings of the agent, in matters of a like kind. In general, however, factors are

(d) *Clarke v. Powell*, 4 B. & Ad. 846, (24 E. C. L. R.)

(e) *Wilkes v. Ellis*, 2 H. Bl. 555.

(f) *Gibbons v. Rula*, 4 Bing. 301, (13 E. C. L. R.)

(g) 4 Burr. 2163.

(h) *Per Best, C. J., Gibbons v. Rula*, 4 Bing. 305, (13 E. C. L. R.)

authorized to act by letter;(i) and although, as is stated by a learned writer, a more formal \*authority is generally given to authorize an agent to subscribe a policy, than for the [ \*11 ] purpose of authorizing any other act having reference thereto,(k) still it is clear that, except in the case of a policy under seal, such formal authority is not necessary; and that, whatever the custom may be, an insurance broker, like any other agent of that class, may, in general, be appointed by parol.

Such, it is believed, is the general rule of law with reference to the appointment of mercantile agents—a rule arising out of the exigencies of commercial transactions, and adopted by the wisdom of the common law, in order to facilitate the dealings of those engaged in them. Still, however, there is one case in which its applicability appears somewhat doubtful,—that, namely, in which the party appointing the agent, happens to be a corporation; and it will, therefore, be proper for us to examine how far, according to the present state of the law, the rule above stated is really applicable to this particular case.

The old rule of law was, that a corporation aggregate could do nothing, except by deed under the common seal;(l) and although the strictness of this rule was relaxed in so far as regarded the doing of matters of small importance, such as the retainer of servants and the like, still, in everything relating to contracts, the law has, until very recent times, remained unchanged. “A corporation aggregate,” it was said, “cannot without deed make or enter into any contract; and by like reason they cannot, without deed, empower another to do that act, which they themselves cannot do but under these circumstances.”(m)

In modern times, however, this rule has been greatly modified. “Corporations,” says Rolfe, B., delivering judgment in the case of the Mayor of Ludlow v. Charlton,(n) “have of late been established, sometimes by Royal Charter, \*more frequently by act of parliament, [ \*12 ] for the purpose of carrying on trading speculations; and when the nature of their constitution has been such as to render the drawing of bills, or the constant making of any particular sort of contracts necessary for the purposes of the corporation, there the courts have held, that they would imply in those who are, according to the provisions of the charter or act of parliament, carrying on the corporation concerns, an authority to do those acts, without which the corporation could not subsist.” In pursuance of this principle, it has been held, that a company incorporated for the purpose of supplying gas light and coke, might maintain an action for the price of gas supplied, although there had been no contract under seal;(o) or for breach of a contract by the defendant to accept gas from them at a certain price yearly, although the contract by the company to supply such gas was not under seal;(p) and in the same case it was held, that wherever a corporation had power, by law, to enter into a contract with-

(i) Com. Dig. Merchant, B.

(k) 2 Phillips on Insur. 555, 2nd edit.

(l) Com. Dig. Franchises, F. 13.

(m) Rex v. Biggs, 3 P. Will. 425.

(n) 6 M. & W. 814.

(o) City of London Gas Light and Coke Company v. Nicholls, 2 C. & P. 365, (12 E. C. L. R.)

(p) Church v. The Imperial Gas Company, 6 A. & El. 846, (33 E. C. L. R.)

out using their common seal, they might sue or be sued thereon, whether such contract were executed or executory, express or implied.

It seems then to be, at present, a recognized principle in our law, that a corporation established for the purpose of carrying on any particular trade, is competent to enter into contracts not under seal, with reference to all matters necessary for the purposes of the corporation,—such as the sale of commodities, to supply which the corporation was expressly created,(g) or the purchase of such articles as are necessary in order to enable the corporation to carry on its trade.(r) And, applying this principle to the rule of law as stated in the case of *Rex v. Briggs*.(s) it seems reasonable to infer, at least in the absence [ \*13 ] of any express decision to the \*contrary, that as a trading corporation may, without deed, enter into contracts both of sale and purchase, when such contracts are in furtherance of the objects for which the corporation was created, so they may, without deed, empower another to do those acts, and may therefore, without deed, appoint a factor or broker for that purpose.

The modes of appointment mentioned above, apply of course, to such cases only as are within the scope of the usual employment of a factor or broker, that is, to the making of contracts for the sale or purchase of goods or merchandize, or to the doing of such other acts as naturally arise out of the ordinary transactions of trade, commerce, or navigation. But wherever the authority conferred on the factor or broker extends beyond these limits, the mode of appointment must, as in the case of any other agent, vary accordingly. Thus, if he be authorized to execute a deed in the name of his principal, such authority must be conferred by deed,(t) unless the instrument which he is authorized to execute be unnecessarily under seal, (as in the case of the assignment of a ship under the Registry Act, 3 & 4 W. 4, c. 55,) in which case a parol authority will be sufficient.(u) So if a factor or broker be authorised to execute a release of a contract originally entered into by deed, his authority so to do must likewise be by deed.(x) Again, if a person usually employed as a factor, were to be retained for any of the purposes described in the *first*, *second*, or *third* sections of the Statute of Frauds, as to make or create leases, estates, or interests of freehold, or terms for years, or any uncertain interest, other than leases under three years, in messuages, manors, lands, tenements, or hereditaments, or for surrendering the same (except copyhold interests,) his authority would require to be in writing.(y) And [ \*14 ] it is said that, in the \*management of the affairs of a foreign merchant—especially when there is occasion to discharge debts and receive money, or to carry on judicial proceeding,—a power of attorney is the proper evidence of authority, as it alone empowers the factor to represent his principal, and to act as the latter might have done, if present.(z)

(g) 2 C. & P. 365, (12 E. C. L. R.) 6 A. & E. 846, (33 E. C. L. R.)

(r) *Beverly v. The Lincoln Gas Light and Coke Company*, 6 A. & EL. 829, (33 E. C. L. R.)

(s) *Supra*.

(t) Co. Litt. 48 b.

(u) *Hunter v. Parker*, 7 M. & W. 322. (\*)

(x) *Bac. Abridg. Release*, A. I.

(y) 29 Car. 2, c. 3, ss. 1, 2, 3.

(z) 1 Bell, Com. on Merc. Jur. 386.

Lastly : It is enacted by statute 3 & 4 Will. 4, c. 52, s. 130, that whenever any person shall make application to any officer of the customs to transact any business on behalf of any other person, it shall be lawful for such officer to require the person so applying to produce a written authority from the person on whose behalf such application shall be made, and in default of the production of such authority, to refuse to transact such business ; whence it appears, that, for the purpose of entering or clearing goods under the above statute, it is necessary that the factor or broker who is charged with this duty should be furnished with a written authority.

With reference to the question, by whom may a factor or broker be appointed, little difficulty can arise, except in cases where more than one person is concerned in such appointment. Where the person appointing acts merely for himself, there the general rule applies, namely ;—that whatever a man has power to do in his own right, he may appoint an agent to do for him.(a) But when the person appointing acts for others, as well as for himself, there a question may arise as to the fact of his having had authority to make such appointment ; and if in making the same he have gone beyond his authority, such appointment will, except as to himself, be invalid.

\*The point therefore to be ascertained in all such cases [ \*15 ] is this ;—had the person appointing the factor or broker, authority so to do ? If he had, then the appointment will bind all those on whose behalf it was made ; otherwise it will not. And here it may be as well to observe, that we do not now refer to cases in which an express authority has been given by several persons to one of their number, to nominate an agent to act on behalf of all ; as in such a case no question could arise with reference to the validity of the appointment : but we speak, at present, of cases in which this authority is merely implied ; and we shall therefore confine our attention to the inquiry,—under what circumstances does this implied authority exist ?

It may then be laid down as an undoubted principle in our law, that one partner may appoint a factor or broker to act for the partnership in any matter connected with the ordinary business of the concern ; and that the contract of the agent so appointed will bind the firm. The reason of this is :—that the act of one partner binds all his copartners, on account of the communion of profit and loss.(b) In conformity with this principle it has been decided, that one partner may appoint a broker, for the purpose of getting an insurance effected on the partnership property ;(c) and so it is said, that one partner may consign goods to a factor for sale, and that his letter of instructions will bind the firm, even although it may have been written without the knowledge of his copartners.(d)

(a) See Smith's Merc. Law. 77, (Law Library.) The learned author of that work very properly limits this maxim to acts which a man has power to do in his *own right* ; for, as we shall see more fully hereafter, where a man is merely an agent, he cannot in general delegate his authority.

(b) Per Heath, J. *Coope v. Eyre*, 1 H. Bl. 37. 45. This maxim, however, should perhaps be adopted with the following qualification, namely ; that the act done be within the scope of the partnership concern. See Collyer on Part. 129.

(c) *Hooper v. Lusby*, 4 Camp. 66.

(d) Story Com. on Agency, § 39.

The same rule applies to the case of a secret or dormant partnership.(e)

[ \*16 ] But if the persons concerned in any particular adventure \*be not strictly partners, then no one of them will be taken to have authority to appoint a factor or broker, so as to bind the others. This of course follows from the fact, that as such a person cannot by his personal contract without express authority, bind any one but himself; so he cannot delegate to an agent a degree of authority which he himself does not possess. And it seems, that even if a number of persons agree to purchase a certain commodity of which each one is to have a particular share, and, in pursuance of such agreement, they entrust a broker to make the purchase in the name of one of the parties only, which he does; the vendors will not be entitled, in the event of the bankruptcy of that party to charge the others, unless it be made to appear that they acted in the transaction as partners. This will appear from the following case. The defendants E., H., and P., agreed that they should purchase jointly as much oil as they could procure, in the prospect that the price of that commodity would rise; that E. should be the ostensible buyer, and that the others should share in his purchase at the same price which he might give; E. to have one half, and H. and P. one fourth each. Accordingly one G. a broker was ordered to make the purchase, which he did in the name of E.; E. afterwards failed, and it was held that the others were not liable for the whole; because, though the parties were jointly concerned in the purchase, they were not to be jointly concerned in the future sale;—it having been in fact a mere undertaking with the broker by each for a particular quantity, without any agreement to share with one another in the profit and loss,—in consequence of which, the parties were not to be considered as partners.(f)

In like manner it has been held, that one part owner of a ship has no authority, as such, to insure the interests of the other part owners; [ \*17 ] and consequently he cannot give such \*an authority to a broker, so as to bind them.(g) But still an authority of this kind may be implied from circumstances; and therefore where one of several part owners of a ship, without any express authority from the others, effected a joint insurance on the entire ship, charging the premium and commission in the ship's accounts, which were open to the inspection of, and were actually inspected by the other owners, and not objected to:—it was held, that the jury were warranted in finding, that the managing owner had a joint authority to effect an insurance for the whole; and that, consequently, all the owners were liable to the broker, notwithstanding the credit was given in the first instance to the managing owner alone.(h)

It has likewise been held in America, that one part owner of a cargo has no authority, as such, to insure the interests of the other part owners, and that therefore he has no power to appoint a broker for

(e) *Coope v. Eyre*, 1 H. Bl. 45. 49.

(f) Per Lord Loughborough, and *Gould J. Coope v. Eyre*, 1 H. Bl. 45. 49. See also *Hoare v. Dawes*, 1 Doug. 371.

(g) *French v. Backhouse*, 5 Burr. 2727; *Bell v. Humphries*, 2 Stark. 345, (3 E. C. L. R.)

(h) *Robinson v. Glendow*, 2 Scott, 250. (30 E. C. L. R.)

that purpose.(*g*) But if the parties are partners, as well as part owners,—as for example where a ship is owned by a firm as part of the joint stock,—in such a case one of the partners may instruct a broker to insure the interests of all.(*h*)

And it is said by some of the older writers, that if several merchants make consignments to the same factor, and he make a joint sale to one person of their several consignments, and the vendor fail: each one of the principals must bear an aliquot share of the loss, although they are mere strangers to one another.(*i*)

## \*CHAPTER II.

[ \*18 ]

### ON THE DUTIES AND POWERS OF FACTORS AND BROKERS.

#### SECTION I.—DUTIES.

HAVING thus seen what is the nature of the employment in which factors and brokers are most usually engaged, what persons may act in these capacities, and how they may be appointed,—it follows next in order to inquire, what are the duties incumbent on these functionaries whilst acting in pursuance of such an appointment. This subject will perhaps be best considered with reference to the following cases: first, where the factor or broker has received express instructions from his principal; secondly, when merely general instructions have been given; and thirdly, such duties as are generally incidental to these employments, without reference to the question whether particular instructions have been given or not. In this enumeration it will not be attempted to note particularly the duties which factors and brokers are required to perform in each individual case. This indeed would be an almost impossible task, inasmuch as their duties are, by the usages of trade and other causes, varied more or less in nearly every instance. The following summary therefore, will be confined to such rules only as are believed to be generally applicable, and particular cases will be introduced merely as illustrations of these general rules.

When a factor or broker has received express instructions, he must pursue those instructions strictly.(*a*) If he do not \*he [ \*19 ] will render himself responsible to his principal for what- ever loss or damage is caused by his deviation from them; unless, as we shall hereafter see, the meaning of the instructions be doubtful, and the agent has acted in good faith, although under a mistaken notion of their purport. But if this be not the case, and he deviate from his instructions, he will be liable for all loss resulting therefrom, whether such deviation originated in an intention to benefit his principal or to defraud him.(*b*) Indeed the only question in such cases

(i) See *Foster v. United States Insurance Company*, cited 2 Phillips on Insurance, 555.

(h) *Hooper v. Lusby*, 4 Camp. 68.

(i) *Beawes*, Lex Merc. 41; *Molloy*, 463; *Vin. Ab. Factor*, D. pl. 1.

(a) *Com. Dig. Merchant, B.*; *Malyne*, Lex Merc. 154.

(b) *Com. Dig. Merchant, B.*; *Catlin v. Bell*, 4 Camp. 183.



seems to be,—has the agent pursued the terms of his commission? and if he have not, he will, except in a few instances to be hereafter mentioned, be held liable. Thus, where the plaintiff, a milliner, intrusted the defendant with a quantity of goods, to be sold by him on her account in one of the West India islands, and the latter, not being able to sell the goods in the island to which they were destined, sent them to the Caraccas in search of a market, where they were destroyed by an earthquake; it was held, in an action brought against the defendant for not accounting, that he was liable for the loss: and the reason given by the court was, “that there being a special confidence reposed in the defendant with respect to the sale of the goods, he had no right to hand them over to another person, and to give them a new destination.”(c) From this then it appears, that whatever may have been the agent’s motive in engaging in the unauthorized dealing or speculation, he will be liable to his principal for any loss which may happen to him therefrom; and it has in like manner been decided that, even should the principal suffer no actual loss by the misconduct of his factor or broker, yet if the latter have, by deviating from his instructions, or by acting in a manner inconsistent with the trust reposed in him, made a profit to himself, he will be [ \*20 ] obliged to account to his principal for such profit, and will \*not be allowed to retain any advantage arising from it;(d) and in both cases he will forfeit his commission.(e)

In order, however, to entitle the principal to a remedy against his factor or broker in such cases as the above, it is necessary that he should have forfeited by reason of the agent’s misconduct, some right which, but for such misconduct, the law would have enabled him to enforce. Thus, where the mate of a ship, who was to receive, in lieu of wages, three privilege slaves, free of expense, on the ship’s arriving at the port of sale, directed the defendant, who was a broker, to effect an insurance on his privilege, which the latter neglected to do, and the ship was afterwards lost;—it was held that no action could be maintained against the broker to recover the value of the slaves, because they “were not the subject of insurance, and the plaintiff could not recover in that action more than he could have recovered in an action against the underwriters.”(f) And so where an order for insurance directed the brokers to insure a certain sum, with premiums and duties, which they omitted to do; but it appeared at the trial that the loss could not be recovered on another account; Lord Ellenborough, in his direction to the jury, observed;—“for omitting to include the premiums, the defendants would certainly be liable if the plaintiff had thereby sustained any damage; but the court has decided that he was not entitled to recover upon the policy, and he would not have been in a better situation if the premiums had been included.”(g)

Such is the general rule of law on the subject now under consideration; but still it must be borne in mind that circumstances may occur

(c) *Catlin v. Bell*, 4 Camp. 183.

(d) *Russell v. Palmer*, 2 Wils. 325; *Malyne*, 89; *Com. Dig. Merchant B.*

(e) *Com. Dig. Merchant, B.*

(f) *Webster v. De Tastet*, 7 T. R. 157.

(g) *Fomin v. Oswald*, 3 Camp. 357.

which will render it excusable in a \*factor or broker to depart from his instructions. Thus, wherever by adhering to them he would be guilty of an illegal or immoral act, he may deviate from them, and should his principal suffer loss thereby he has no remedy, for, to use the words of Lord Mansfield, "if from the plaintiff's own showing or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, then the court says he has no right to be assisted."<sup>(h)</sup> If, therefore, a compliance with the instructions of the principal would involve a fraud on third parties, the agent has a right to deviate from them;<sup>(i)</sup> so if a factor were instructed by his principal to buy smuggled goods, and pay for them, he would be justified in violating such instructions; and we shall hereafter see that, were he to obey them, he would not be allowed to recover from his principal either his commission or the advances made by him with reference to that particular transaction.<sup>(k)</sup> The same would be the case if a factor were employed to buy or sell goods in a foreign country, and it were agreed between him and his principal, that they should be smuggled into England.<sup>(l)</sup> But, in order to excuse a factor for a breach of his instructions on account of their illegality, it must appear that the illegal transaction formed part of the original agreement between him and his principal; and therefore, where an action was brought against a factor for not accounting for goods delivered to him in this country for the purpose of their being sold by him abroad, it was held to be no defence that the goods were exported without paying duties, because it was not proved that the evasion of the duties was actually agreed upon between the plaintiff and the defendant.<sup>(m)</sup>

\*It seems to be at present a doubtful question, whether [ \*22 ] a factor is justified in deviating from his instructions merely by the occurrence of such circumstances of necessity and emergency as may induce him, in the exercise of his best skill and judgment, to believe that the deviation would be for the benefit of all parties. It is laid down by Dr. Story that instructions, in every case of mercantile agency, "are applicable only to the ordinary course of things, and that the agent will be justified, in cases of extreme necessity and emergency, in deviating from them;" and that learned writer gives as illustrations of this rule, cases in which goods intrusted to an agent for sale, are perishable and perishing, or where they have been accidentally injured, or where they are in danger of being lost by the capture of the port to which they have been consigned;<sup>(n)</sup> in each of which instances, he is of opinion, that a deviation from his instructions, either as to the time or place of sale, or as to the price at which the goods should be sold, would be justifiable on the part of the factor.

It is believed however, that no decision has taken place in our courts which goes the length of establishing this principle: and indeed the contrary opinion seems at one time to have been maintained.

(h) *Holman v. Johnson*, Cowp. 341.

(i) See *Bexwell v. Christie*, Cowp. 395.

(k) *Ex parte Mather*, 3 Ves. J. 373.

(l) See observations of Lord Mansfield, *Holman v. Johnson*, Cowper, 345.

(m) *Catlin v. Bell*, 4 Camp. 183.

(n) *Story on Agency*, § 193.

Thus it is stated by Beawes,<sup>(o)</sup> that a factor should blindly follow his instructions; and in an Anonymous case in 2 Mod. Rep. 100, it was held that: In an action of account against a factor, he shall not be allowed a sale upon credit, although the goods were *bona peritura*; for without a special commission a factor cannot sell the goods of his principal except for ready money. On the other hand it is stated by Malyne, and laid down on his authority by Chief Baron Comyn, that a factor shall make satisfaction if he sells for a less price than was directed, only when he does so without sufficient reason:<sup>(p)</sup> and

[ \*23 ] it \*does not appear to be straining this opinion to infer therefrom, that if there be reasons which would excuse a factor for selling at a less price than he was directed, so, circumstances might occur which would excuse a deviation on his part from any other article in his instructions. There certainly does not appear to be any ground for admitting the excuse in the one case, and not in the other; and it is submitted, that the reasoning of the court in the above case from the Modern Reports, does not satisfactorily establish the contrary opinion. One of the grounds of that judgment is, that if the factor can find no buyers, he is not answerable. But surely it does not follow from this that he should be answerable provided that, when he finds the goods are perishing and are in danger of being deteriorated or destroyed by remaining in his hands, he sells them in order to prevent a partial or total loss both to himself and his principal, even although in so selling them he deviates from his instructions. It must be borne in mind, that, as we shall hereafter see more fully, a factor is bound under all circumstances to exercise reasonable care, skill and diligence in the performance of his duties. Although, therefore, it were to be admitted that, in certain cases of emergency he would be justified in deviating from his instructions, yet the principal would not be left without remedy; because the factor would still be liable for any want of skill or diligence of which he might have been guilty, either in concluding without sufficient inquiry, that a departure from his instructions was necessary: or in his subsequent conduct with reference to the disposal of the goods. That this consideration had some weight with the court in the case now under review, is not unlikely; for it is there said, that "it was not pleaded that he could not sell the goods for ready money; and the sale itself was made beyond sea, where the buyer was not to be found." Now there can be no doubt that if the factor, either in selling the goods on credit when that was not necessary, or supposing it to have been necessary,

[ \*24 ] in his choice of a purchaser, were guilty of \*negligence, he would be liable for the consequences; but it does not therefore follow, that if he were not guilty of such negligence, the same liability would attach to him merely because he had deviated from his instructions. It is to be observed moreover that the opinion of the courts at the present day as to the power of a factor to sell on credit, does not agree with that expressed in the above case;—indeed the law is now quite the other way,<sup>(q)</sup> and the practice of mercantile

(o) Lex Mercatoria, 41.

(p) Malyne, 82; Com. Dig. Merchant, B.

(q) See per Willes, J. Scott v. Sarman, Willes, 400. 407; Houghton v. Matthews, 3 Bos. & Pul. 489.

men, it is believed, has changed accordingly,—a factor being now rarely, if ever, bound by his orders to sell for cash only. The facts of the case under consideration therefore, can at the present day, be scarcely expected to occur; and for the reasons given above it is submitted, that the principles on which it was decided, are not sufficient to overturn the general proposition;—that, under circumstances of emergency, a factor may deviate from his instructions; and that if in so doing he exercise reasonable and proper care, skill and diligence, he will not be liable for loss which may ensue therefrom.(r) This principle certainly seems to be supported by sound policy; inasmuch as it would in most instances be attended with benefit both to the factor and his employer; it appears to have been adopted into the mercantile law of America; and, reasoning from analogous cases,—such as that of the master of a ship, whose authority in cases of emergency to sell the ship for the benefit of all parties interested seems now to be quite settled,(s)—it is not improbable, that at the present day it would likewise have the sanction of the courts of this country.(t)

\*It is clear that a factor or broker will not be held liable [ \*25 ] for any loss arising from the non-fulfilment of his instructions, where, after having done what is usual in like cases in order to fulfil them, he finds this to be impossible. Thus, where the defendants were instructed to effect an insurance on certain goods, but the underwriters refused to engage in the risk, because the vessel by which the goods had been shipped was not registered at Lloyd's; it was held that,—a loss having occurred, the defendants were not liable; and the reason assigned was, that "if a person to whom such orders are sent, does what is usual to get the insurance made, that is sufficient; because he is no insurer, and is not obliged to get insurance at all events."(u)

So it is said, that where a factor is instructed to purchase goods at a limited price, and exceeds that price, but in some other part of the transaction,—as for example in the freight,—he is able to effect a saving equal to the excess of price, he will, at least in equity, be excused. Indeed Lord Hardwicke was of opinion, that it would be very mischievous were it otherwise.(x)

We shall hereafter see that a factor or broker is at liberty to ingraft on the written instructions of his principal, any verbal orders which he may subsequently receive from him, varying those instructions. And in like manner it is presumed that, if a factor or broker who has received written orders limiting his authority, is at the same time referred by those orders to the verbal communications of another agent of the principal, who states that he has authority to vary, and does in fact vary the original instructions;—the factor or broker would be held justified in deviating from those instructions on the

(r) See also Chitty on Com. and Manuf. 218.

(s) *Hunter v. Parker*, 7 M. & W. 322. (\*)

(t) By the law of Scotland, a factor at a distance, and in difficult circumstances, will be discharged, if he act with sound discretion. Bell's Principles of the Law of Scotland, § 225, (2.) This is the very principle contended for. See also the remarks of Dr. Paley on this subject, Mor. & Pol. Phil. B. 3, Ch. 12.

(u) *Smith v. Colohan*, 2 T. R. 188, note a.

(x) *Cornwall v. Wilson*, 1 Ves. 509.

faith of the agent's representations, and that parol evidence would be [ \*26 ] admissible for the purpose \*of establishing the new instructions given by the agent. Such at least has been held to be the law in America; (y) and a recent decision in our own country, would seem to warrant the same conclusion. (z)

It is likewise a well known principle of law, that subsequent assent is equivalent to previous authority; and hence it follows that where an agent has been guilty of any breach of duty, and the principal with full knowledge of all the circumstances adopts his acts, even for a moment, he will be bound by them, and the agent will be discharged. (a) Moreover an adoption of the agency merely in part, will operate as an adoption of the whole transaction:—for the principal is not at liberty to affirm the act of his agent as to so much as is beneficial, and to reject it as to the remainder. (b) Nor is it necessary that such ratification by the principal, should be made in express terms, but it may be inferred from his conduct; and therefore, although it is contrary to the duty of a factor to lend his principal's money, yet where a factor did so, and his principal received the interest of the sum lent, he was held to have thereby confirmed the loan. (c) The principal must likewise notify his disapproval of his agent's conduct, within a reasonable time, and if he fail to do so the agent will be discharged. (d)

It appears then that, in general, a factor or broker is bound to follow his instructions literally, unless there be something in the nature of the instructions themselves which renders it improper that he should do so; or unless by the happening of certain events after the instructions [ \*27 ] are given, he should be relieved from the whole, or some part of this duty. There is however one case to which these principles do not apply;—that namely in which a factor has been instructed to effect an insurance on goods consigned to him. The factor's duty in this instance, depends, as we shall see, on rules having a peculiar reference to itself; and it therefore claims our consideration apart from the other cases to which we have adverted.

The law on this subject is thus stated by Buller, J. in the case of *Smith v. Lascelles*. (e) "It is now settled as clear law, that there are three instances in which an order to insure must be obeyed. First, where a merchant abroad has effects in the hands of his correspondent here, he has a right to expect that he will obey an order to insure, because he is entitled to call his money out of the other's hands when and in what manner he pleases. The second class of cases is where the merchant abroad has no effects in the hands of his correspondent, yet, if the course of dealing between them is such, that the one has been used to send orders for insurance, and the other to comply with them, the former has a right to expect that his orders for insurance will still be obeyed, unless the latter give him notice to

(y) *Manella v. Barry*, cited *Story on Agency*, § 81.

(z) See *Adams v. Wordley*, 1 M. & W. 380. (\*)

(a) Per Buller, J. *Smith v. Cologan*, 2 T. R. 189.

(b) *Wilson v. Poulter*, 2 Str. 859; *Cornwall v. Wilson*, 1 Ves. 509.

(c) *Clarke v. Perry*, 2 Freem. 48. (d) *Prince v. Clarke*, 1 B. & C. 186, (6 E. C. L. R.)

(e) 2 Term R. 187.

discontinue that course of dealing. Thirdly, If the merchant abroad send bills of lading to his correspondent here, he may ingraft on them an order to insure as the implied condition on which the bills of lading shall be accepted, which the other must obey if he accept them, for it is one entire transaction."

In cases of this last description the law seems to have been laid down very strictly; this will appear from the following decision. The plaintiff, who resided in South America, inclosed a bill of lading of certain cotton in a letter addressed to the defendants, who were merchants in London, requesting them to effect insurance and sell the goods. The defendants had not done business for the plaintiff before, and had not come under any promise to act as his consignees. For some reason they wished to decline doing so; and accordingly, on receiving the bill of lading they indorsed it [ \*28 ] over to one M., a friend and creditor of the plaintiff. M. effected the insurance and received the goods, which never came to the possession of the defendants; and he afterwards became insolvent with the proceeds in his hands. The plaintiff brought his action to recover from the defendants the value of the goods, and it was contended that they were not liable, inasmuch as the consignment had been thrust upon them, and that they had acted *bona fide* for the plaintiff's interest. Lord Ellenborough, however, who tried the cause, was of opinion that they were liable; "they had their election," his lordship observed, "either to take or reject the bill of lading. If they took it, they were bound to take it according to the terms of the consignment, by which they themselves were to insure and sell the goods." It was held therefore, that the defendant had no right to indorse the bill of lading, and the plaintiff had a verdict accordingly.(f)

It has likewise been held, that although orders are given to insure, amongst others, against one risk in regard to which the insurance would not be valid; still if the policy would not be thereby void, but would be valid *pro tanto*, the orders are binding, notwithstanding they include one risk which cannot lawfully be insured against;(g) and Dr. Story is of opinion that, in addition to the cases mentioned in *Smith v. Lascelles*, a factor is bound to insure wherever the general usage of trade requires that he should do so.(h)

We have already seen, however, that a factor is in no case bound to procure an insurance at all events, and that it will be sufficient if he do all that is usual in order to accomplish this object.(i) But still, in the event of his being unable to effect such insurance, [ \*29 ] he is bound to communicate that fact to his principal: and his duty cannot be well performed unless he do so; because, as was observed in a recent case, his failure in this respect might prevent his principal from getting the insurance effected elsewhere.(k)

Hitherto we have considered the duties of factors and brokers with reference only to those cases in which they have received special and definite instructions. It happens however, not unfrequently, that the instructions given to both these classes of agents are of a very general

(f) *Corlett v. Gordon*, 3 Camp. 472.

(g) *Glaser v. Cowie*, 1 M. & Sel. 52.

(h) *Story on Agency*, § 190.

(i) *Smith v. Cologan*, *supra*.

(k) *Per Tindal, C. J., Callander v. Oelrichs*, 6 Scott, 761. 767.

character;—the act to be done being the only matter specified, the mode of doing it being left to the direction of the agent; and the rule in such cases seems to be this:—that the factor or broker is bound to execute his commission *bonâ fide*, and to the best of his judgment. This will appear from the following decision. An action was brought by the plaintiff, a merchant at Alicant, against the defendant, his agent in London, for misbehaviour in not insuring the plaintiff's goods agreeably to his directions. The goods were a cargo of fruit; and by the letters produced in evidence it appeared that the plaintiff had not given the defendant any particular directions how, or with whom to insure, but only generally, to insure the cargo. The defendant insured with the London Insurance Office, who, it appeared, always inserted on policies on fruit, an exception, free from particular average. The policy in question, therefore, was made with that exception. The loss was not total; for although the goods were at first under water, some were saved; but those that were damaged were not of sufficient value to pay the salvage. The jury found a verdict for the defendant, and one of them said that the reason of their returning this verdict was, that they thought the defendant had acted in the matter *bonâ fide* to the best of his judgment. A motion for a new trial was afterwards made on the ground that, though the [ \*30 ] commission was to insure generally, and no particular directions given, yet it behoved the defendant to discharge it in such manner as would effectually answer the end proposed. The court, however, refused the rule; and Lord Mansfield, in delivering judgment, stated the law on the question as follows. "To maintain this action, the defendant must be guilty either of a breach of orders, gross negligence, or fraud. My direction to the jury was general; that if they thought there was gross negligence, or the defendant had acted *malâ fide*, they should find for the plaintiff. If, on the contrary, they were of opinion that he had acted *bonâ fide*, and to the best of his judgment, then they should find for the defendant. In delivering their verdict they say, "they did not think the defendant guilty of gross negligence, or that he had acted *malâ fide*." The court therefore, will not say so. The plaintiff, if he pleased, might have given orders not to insure at the London Insurance Office, but at some other office where this exception would not have been insisted on. But he gives no directions at all; therefore he left it to the discretion of his correspondent, who, if he meant no fraud, was at liberty to elect between the underwriters." (l) This doctrine has been confirmed by subsequent cases, and it has even been held by one learned judge, that the parties ordering insurance to be effected, must be taken to be cognizant of the existence of the various companies and the tenor of their policies, and that, therefore, if they wish to have insurances effected on the terms of any particular company, they ought to give special directions for that purpose. (m)

The rule laid down in the case of *Moore v. Mourgue* applies to all other cases, as well as to those connected with the effecting of insurances. Thus it has been held that, although a broker is bound to

(l) *Moore v. Mourgue*, Cowp. 479.

(m) Per Ellenborough, C. J., *Comber v. Anderson*, 1 Camp. 593, 594.

obey the positive directions of the assured to abandon, [ \*31 ] yet if he referred to his discretion whether to abandon or not, and he acts *bonâ fide*, he is not liable to an action for neglecting to abandon.(n) And so it is clear, that when a factor has merely general instructions to sell, he is at liberty to sell on the best terms he can obtain at the time; and that if, in so doing, he act *bonâ fide*, and to the best of his judgment, the mere fact of the sale proving ultimately disadvantageous will not render him liable to his principal as for a breach of duty.(o)

There is, however, one limitation to the above rule, namely; that when an agent is employed generally to do any act, he is authorized to do it only in the usual way of business; and accordingly, where there is a known usage of trade applicable to the particular case, it becomes the duty of the factor or broker to follow that usage, in preference to any other course which his own judgment may suggest.(p) Indeed it is only by so doing that he can secure himself from liability; for, whilst there can be no doubt that when any agent receives merely general instructions, he will, by following the usage of trade *bonâ fide*, be protected in the particular case from all responsibility to his principal, it is equally clear that he will not be protected from the consequences of a departure from the usage itself, even although, in deviating therefrom, he may have acted with a view to his employer's advantage.(q) Still however it is presumed, that if there be any circumstances which would justify a factor or broker in departing from express instructions, the same or similar circumstances would be sufficient to warrant him in deviating from the usage of trade. In certain cases of pressing emergency therefore, such a deviation would perhaps be excused.(r)

\*But although by thus adhering to the customs and [ \*32 ] usages of trade where no express instructions have been given, a factor or broker will protect himself from responsibility, the case will be otherwise if it be made to appear that in so doing he has acted negligently, or *malâ fide*.(s) Indeed, as has been very justly observed by Dr. Story, the very notion of a usage is, that "it is to be a guide to the agent's judgment and discretion in common cases, where it is presumed not necessarily to work a sacrifice of the interests of his employer." In following the usages of trade therefore, the agent must exercise a proper degree of skill and caution. He is not, on the one hand, at liberty to swerve from them, merely because he has some speculative notion that by so doing he will benefit his principal; nor, on the other, will he be justified in adhering blindly to them, when to a man of common prudence, such a course would appear to be attended with manifest disadvantage. The case of *Wiltshire v. Sims*, well illustrates the former of these propositions; and the following dictum of Lord Holt appears fully to confirm the latter: "If," says his lordship, "a man be factor in a sort of dealing

(n) *Comber v. Anderson*, supra.

(o) *Malyne*; *Lex Merc.* 81; 3 *Chitty, Com. & Man.* 217.

(p) *Wiltshire v. Sims*, 1 *Camp.* 258.

(q) *Wiltshire v. Sims*, supra.

(r) See ante, p. 24.

(s) *Sadock v. Burton*, *Yelv.* 292; *Malyne*; *Lex Merc.* 82; *Anon.* 12 *Mod.* 514.



or trade where the usage is for factors to sell upon credit, then, if he sell to a person of good credit at the time, and he afterwards become insolvent, the factor is discharged, but otherwise if it be to a man notoriously discredited at the time of sale.”(t)

Such, it is believed, are the most important of what may be termed the positive duties of factors and brokers. But besides these there are certain incidental duties, a due attention to which is incumbent on them, as well as in the performance of those duties which have been already enumerated, as in the exercise of their employment generally. Let us therefore inquire what these incidental duties are.

[ \*33 ] \*First then, a factor or broker, like every other agent who is retained to perform certain work for hire, is bound to exercise skill and ordinary diligence in the course of his employment;(u) by the term *reasonable skill* being meant, “such skill as is ordinarily possessed by men of that profession or business,”(x) and by *ordinary diligence* being generally understood, a degree of diligence adequate to the management of the particular transaction.(y) This duty indeed forms one of the distinguishing features between the case of a simple *mandatory*, and that of an agent who is to receive a reward for his services. In the former case the agent is not absolutely required to possess all the skill requisite for the due discharge of the commission which he undertakes. If he does in fact possess such skill he will, it is true, be bound to use it.(z) But, if he is known not to possess such skill, and merely engages to execute his commission to the best of his ability, all that is incumbent on him is, fairly to exercise the skill of which he is master.(a) The same rule holds with regard to the degree of diligence required of such an agent; it being now admitted on all hands, that when the agency is entirely for the benefit of the mandator, the mandatary will not be liable unless he has been guilty of gross negligence.(b) When, however, the agent is to receive a reward for his labour, the rule is different. In this case the law presumes that the agent, at the time of entering into the contract with his principal, engaged to use a degree of diligence adequate to the performance of the work undertaken; and where skill is required, as well as care, he must likewise be supposed to have engaged himself for a [ \*34 ] due application of \*the necessary art.(c) If a factor, therefore, does not possess the proper skill, or if possessing it, he fails to use it; or if he is in any respect deficient in the exercise of that diligence and attention which is necessary to the due fulfilment of his undertaking, he will be responsible to his employer for all damages which the latter may sustain in consequence of such want of attention or skill. Nor is it necessary in order to constitute a breach of duty in this respect, that the factor should have been guilty of fraud, or of such gross negligence as would amount to evidence of fraud.

(t) Anon. 12 Mod. 514.

(u) Chapman v. Walton, 10 Bing. 57, (25 E. C. L. R.); Seare v. Prentice, 8 East, 348; Denew v. Daverell, 3 Camp. 451; Shiells v. Blackburne, 1 H. Bl. 159.

(x) Per Ellenborough, C. J., Denew v. Daverell, *supra*.

(y) Jones on Bail. 98, 4th edition. (z) See Wilkinson v. Coverdale, 1 Esp. 75.

(a) Shiells v. Blackburne, 1 H. Bl. 159. 162.

(b) Doorman v. Jenkins, 2 Ad. & El. 256, (29 E. C. L. R.) And see as to the law of France on this point, Cod. Civ. Art. 1992.

(c) Jones on Bail. 23. 99.

On the contrary, he is bound, on all occasions, to exercise his judgment after due inquiries and precautions; and in those cases in which he is compelled to rely for his knowledge of facts entirely on the statements of others, he ought perhaps to report this circumstance to his principal, because by failing to do so he might become chargeable with the consequences, in the event of his information proving to have been incorrect.(d)

The same rule applies to the case of a broker. If, for example, he be employed to negotiate bills of exchange, he is bound to be acquainted with all the proceedings which are necessary by law for the protection of the rights of his principal, and to adopt such proceedings without any unnecessary delay;(e) or, if he be employed to procure insurance, he is bound to make himself acquainted with the nature of the intended voyage, and with all the conditions which are usually inserted in policies effected on that voyage.(f) It is likewise his duty to take care that all the risks to which the particular voyage is exposed are covered by the policy;(g) \*to satisfy himself [ \*35 ] of the solvency of the underwriters,(h) and to disclose to [ \*35 ] them all material facts;(i) and if he act *bonâ fide*, and with reasonable skill and diligence in these particulars, he will not be chargeable with any loss which may ensue, merely because the insurance might have been procured from other persons on better terms, and to include additional risks.(k) So, if an insurance broker employs another to effect a policy for him, it is his duty to give the latter all the instructions with which he himself was furnished.(l)

It is likewise the duty of an insurance-broker who retains in his hands a policy which he has effected, to use reasonable diligence in procuring the underwriters to settle and pay any loss that may happen thereupon;(m) and it seems that if he do not, the broker's laches will be an answer to a demand made by him against his principal, to recover the amount of subscriptions due from any of the underwriters who may have become insolvent without paying, and for which the broker has given his principal credit in account.(n)

A factor whose duty it is to insure the goods of his employer, is bound by the above rules, equally with a broker.(o)

Such are some of the principal instances illustrative of the maxim,—that a factor or broker is bound to exercise reasonable skill and ordinary diligence in the performance of his employment. Isolated cases like the above, however, would not always afford a criterion from which to judge whether this duty had been complied with; and hence the importance of the general rule, namely:—that, in order to decide

(d) See per Abbott, C. J., *Money Penny v. Hartland*, 1 C. & P. 352, 354, (11 E. C. L. R.) *Story on Agency*, § 186; *Story on Bail*, § 431. Lord Kenyon, however, appears to have been of opinion that an agent who acts upon the best advice he is able to get in the affairs of his principal, is not liable to damages arising from that act. *Miles v. Bernard*; *Peake, Add. Cas.* 61.

(e) *Beawas, Lex Merc.* 431.

(f) *Mallough v. Barber*, 4 Camp. 150.

(g) *Park v. Hammond*, 6 Taunt. 495, (1 E. C. L. R.)

(h) *Story, Com. on Agency*, § 187.

(i) *Maydew v. Forrester*, 5 Taunt. 615, (1 E. C. L. R.); *Wake v. Atty*, 4 Taunt. 493.

(k) *Moore v. Mourgue, Cowp.* 479.

(l) *Seller v. Work*, cited *Marsh.* 305.

(m) *Bousfield v. Cresswell*, 2 Camp. 545.

(n) *Jameson v. Swainstone*, 2 Camp. 546.

(o) 2 *Phillips on Insur.* 566.

[ \*36 ] \*whether a factor or broker has in any particular case exercised a proper degree of skill and diligence, regard must be had to the question,—whether he has acted in the same manner as other persons of experience and skill, exercising the same profession, would have acted, under similar circumstances. The law on this subject will appear from the following case. An action was brought against a policy broker for negligence in effecting an insurance, and the question turned on the meaning of the instructions which the broker had received. The court decided in favour of the broker, and Chief Justice Tindal, in delivering their judgment, made the following observations. “The point to be determined is, whether, upon the occasion in question, the defendant did or did not exercise reasonable and proper care, skill, and judgment. This is a question of fact, the decision of which appears to us to rest upon this further inquiry, viz., whether other persons exercising the same profession or calling, and being men of experience and skill therein, would or would not have come to the same conclusion as the defendant. For, the defendant did not contract to bring to the performance of his duty on this occasion, an extraordinary degree of skill, but only a reasonable and ordinary proportion of it; and it appears to us, that it is not only an unobjectionable mode, but the most satisfactory mode of determining this question, to show by evidence, whether a majority of skilful and experienced brokers would have come to the same conclusion as the defendant.”(p)

The very ground of the contract between a factor or broker and his principal, being the opinion which the latter entertains of the personal skill and integrity of the former, it follows that he has, in general, no right to delegate his authority, inasmuch as, by so doing, he would be turning his principal over to another, of whom he knows nothing.(q)

[ \*37 ] \*But although, under ordinary circumstances, a factor or broker does not possess this right, still it may be conceded to him either by the usage of trade, or by express agreement with his principal;(r) and where this is the case, he will of course be bound to exercise in the choice of a sub-agent, as much diligence as would have been required of him in the execution of the commission itself. This indeed necessarily follows from what has been said above. For, when the terms of the agreement between the factor or broker and his principal, are such as to admit of the employment of a sub-agent by the former, it can hardly be supposed that the principal contracts for a less degree of diligence and skill in the substituted, than he would have a right to demand from the immediate agent. Such agent, therefore, is bound to ascertain the qualifications of his substitute, and will be liable for the consequences of a breach of duty, if he fail to do so.

We have seen that one essential feature in the employment of a factor consists in his having the custody of the goods of his principal; and this circumstance imposes upon him a duty,—common to all cases of bailment in which the goods are delivered to a private person to be carried or otherwise managed for reward, that, namely, of keeping

(p) *Chapman v. Walton*, 10 Bing. 57, (25 E. C. L. R.)

(q) *Cockram v. Irlam*, 2 M. & S. 301, (28 E. C. L. R.)

(r) *Cockram v. Irlam*, 2 M. & S. 301, (28 E. C. L. R.)

the goods intrusted to him with reasonable care.(s) What shall be considered reasonable care in a bailee of this description, has indeed been the subject of some controversy; but the correct conclusion seems to be that given by Sir W. Jones, who states:—that “in whatever point of view we consider this bailment, no more is regularly demanded of the bailee than the care which every prudent man takes of his own property;”(t) or, to use the words of Lord Holt, he is bound “only to do the best he can.”(u)

\*Such then being the extent of the factor's duty in this [ \*38 ] behalf, it follows that he will not be liable for loss happening by robbery,(x) or by fire, or any other accidental damage, unless it have been incurred by his own default.(y) But if, before the happening of the accident by which the goods are destroyed, he have been guilty of any negligence, as by allowing them to remain in an improper place of deposit, he will be responsible for the loss; for, whatever may have been the immediate cause of the loss, the property would not have been in a situation to sustain that loss if it had not been for his previous neglect of duty.(z) It appears, however, that the principal must show that the place where the goods were deposited was not a place of safe custody; and that it will not be sufficient to charge the agent merely to say, that having received the goods for the purpose of selling them, he committed them to the care of a third person which he had no right to do:(a) provided at least, his having done so was under the circumstances warranted by the usage of trade.(b) But a factor is under no obligation to suggest wise precautions against inevitable accidents; and accordingly, he is not obliged to advise insurance from fire, much less to insure the goods intrusted to him without an authority from his principal.(c)

It is upon this principle of taking all ordinary precautions to protect the goods of his employer from risk, that when duties are payable on the export or import of goods, it is held to be incumbent on the factor to whom they are consigned, or who is charged with their dispatch, to take care that the proper entries are made in respect of such goods, and that all duties payable thereon are fully satisfied. If, [ \*39 ] \*therefore, the goods are forfeited by reason of his making a false entry at the custom house, or by his neglecting to pay the customs chargeable thereon, the factor will be liable for the consequences.(d) Such false entry, however, must be made wilfully, in order to render the factor liable; for if, in making it, he follow the invoice or letter of advice, he shall not be charged, inasmuch as the error did not arise from default.(e) In case of loss arising from the factor's misconduct in this respect, he is said to be liable to the extent of the cost price of goods to be exported, or the sale price of goods to be imported, calculated with reference to the country where the seizure is made.(f)

(s) *Coggs v. Bernard*, *Ld. Raym.* 909.

(t) *Jones on Bail.* 94.

(u) *Coggs v. Bernard*, *supra*.

(x) *Coggs v. Bernard*, *Ld. Raym.* 909; *Co. Litt.* 89 a.

(y) *Co. Litt.* 89 b; *Anon.* 2 *Mod.* 100.

(z) *Caffrey v. Darby*, 6 *Ves.* 496.

(a) *Goswell v. Dunkley*, *Stra.* 680.

(b) *Paley on Agency*, by *Lloyd*, 17, note 5.

(c) *Jones on Bail.* 102.

(d) *Com. Dig. Merchant*, B.

(e) *Boares, Lex Merc.* 42; *Molloy*, 329.

(f) *Malyne*; *Lex Merc.* 83; *Vin. Ab. Factor*, B. 2. pl. 4.

The whole subject of the entry of goods and payment of duties, so far as regards the

[ \*40 ] \*One of the first duties of an agent, it has been said, is to keep a clear account, and from time to time to communicate the contents thereof to his principal ;(g) and, in conformity with this rule, it has been decided, that where goods are consigned to a factor for sale on commission, the law raises a contract to account for such as are sold, to pay over the proceeds, and to redeliver the residue unsold on demand.(h) So, if a merchant employs his apprentice as a factor beyond sea, and he dies, his administrator shall account.(i) In like manner, if notice be given by a party to his agent in a particular adventure, that another person is jointly interested with him therein; this *prima facie* imposes upon the agent the necessity of accounting with such other person for his share in the adventure.(k) But this obligation ceases to exist, if the transaction show that it was the intention of such other person, and of the party originally

[ \*41 ] \*interested, that the agent should account solely with the latter.(l) And, where a reasonable time has elapsed, it appears that a jury will, if there be no evidence to the contrary, be justified in presuming that the principal has demanded an account, and that an account has been rendered, and made by the factor on the footing of

revenue laws of this country, is regulated by statute 3 & 4 W. 4. c. 52. The following is a short abstract of the enactments of that statute, with reference to the duties and powers of agents in this behalf.

By sec. 17, Entry inwards of goods imported into the United Kingdom is to be made within fourteen days after the ship's arrival; and if the duties are not paid within three months after the expiration of the said fourteen days, they may be sold, and the proceeds applied in payment of the freight and duties.

Sections 18, 20, and 21, state the particulars which the bill-of-entry inwards should contain.

By sections 19, and 21, Agents making entry of goods, or making a declaration of their value without authority from the owner or consignee of such goods, are made liable to a penalty of £100.

By sec. 24, Any importer or agent who cannot for want of information make a perfect entry of goods, is empowered to make the same by bill-of-sight; but perfect entry must be made within three days.

By sec. 34 it is enacted, That, if the person in whose name goods re-imported into this country were entered for exportation, was not the proprietor thereof, but his agent, such agent shall declare on oath, in the bill-of-store, the name of his employer.

By secs. 61, and 70, Entry outwards and clearance are made necessary before any goods shall be shipped, or waterborne to be shipped to parts beyond seas.

Sections 65, and 66 contain the particulars of the bill-of-entry outwards.

Section 66 imposes a penalty of £100 on any agent who makes a declaration of the value of goods to be exported, unless authorized so to do by the exporter.

The mode of entering outwards for drawback is regulated by section 68.

By section 88, an exporter residing more than 20 miles from the custom house of the port of shipment, is empowered to appoint an agent to pass entry, to clear and ship the goods, and to receive the drawback payable thereon. And such agent may make the declaration required by the act, and shall answer such questions, touching his knowledge of the exportation of such goods, and the property therein, as shall be demanded of him by the collector or controller.

And by the same section, any corporation or company trading by joint stock is empowered to appoint such an agent.

By section 89 it is enacted, that, if goods be consigned by an owner residing beyond seas to any agent in the United Kingdom, to be exported by him to parts beyond seas, such agent may enter, clear, and ship such goods, and receive drawback.

Section 114 regulates the duties of agents and consignees when goods are shipped coastwise.

(g) *Green v. Weaver*, 1 Simons, 404. 424, and per Lord Eldon, *Chedworth v. Edwards*, 8 Ves. Jr. 48. (h) *Topham v. Braddick*, 1 Taunt. 572.

(i) *Lee v. Bowler*, Rep. Temp. Finch, 125.

(k) *Killock v. Greg*, 4 Russ. 285.

(l) *Killock v. Greg*, 4 Russ. 285.

such account.(m) An agent, however, cannot justify a refusal to account by setting up the *jus tertii*; and therefore, where a ship which originally belonged to one of two partners had been conveyed to B., an insurance broker, for securing a debt, and B., became the sole registered owner of the ship, and afterwards as agent for both partners, insured the ship and freight, and charged them with the premiums, and on a loss happening, received the money from the underwriters, it was held that he was accountable for the sum to the assignees of the surviving partner, and not to the executors of the deceased partner, to whom the ship originally belonged.(n)

If an agent does not render his accounts within a reasonable time, he must bear the costs of a suit instituted to have the accounts taken; nor will it be any excuse for him to plead, that he offered to pay on account a gross sum,—which it turns out would have covered all that was due from him.(o) It is likewise his duty to be constantly ready with his accounts, and therefore, neglect in this respect is a good ground for charging him with interest.(p)

Where there are joint factors it appears that, according to the law-merchant, one of them may account without his \*companion; for, as it is said, "factors are oftentimes dispersed [ \*42 ] so as they cannot be both present at their accompts."(q)

The account rendered by the factor or broker should contain not only, on the part of the agent, accounts of his payments, but also, on behalf of his employer, accounts of his receipts;(r) and it is said, that in taking credit for payments a broker is entitled to charge his principal in account, only with the cost price of articles purchased for him.(s)

Where there are joint factors, the receipt of one is the receipt of the other; so that, should one die, the other must account for the whole,(t) even although it should appear that the business was transacted solely by the deceased.(u) So a discharge to one is a discharge to both.(x)

If a factor receives money *ad merchandizandum*, he ought to account for the profits made after the receipt.(y) So it is said, that where he receives money in order to trade therewith, he shall be charged for the profit which he might have made; as if he retains it in his hands when he might have improved it, or where he does not improve it so much as he might.(z) He shall, however, be excused, if it be made to appear that he found nothing to buy without hazard of a loss.(a)

This account should likewise contain a statement of every other increase made by the factor or broker on the property of his principal.

(m) *Topham v. Braddick*, supra; in which case it was held that the space of fourteen years was sufficient to warrant such a presumption.

(n) *Dixon v. Hamond*, 2 B. & A. 310. See also *Croskey v. Mills*, 1 C. M. & R. 298.(\*)

(o) *Collyer v. Dudley*, 1 Turn. & Russ. 421.

(p) *Pearse v. Green*, 1 Jac. & Walk. 135.

(q) Per Tanfield, *arguendo*, *Gore v. Dawbeny*, 2 Leon. 76.

(r) Per Lord Eldon, *White v. Lincoln*, 8 Ves. Jr. 368.

(s) *Proctor v. Brain*, 2 M. & P. 284, (17 E. C. L. R.)

(t) *Holtcomb v. Rivers*, 1 Ch. Ca. 127. Vin. Abridg. Account, K. 2.

(u) *Godfrey v. Saunders*, 3 Wils. 73.

(x) Vin. Abridg. supra.

(y) *Com. Dig. Account*, E. 10.

(z) *Ibid.*

(a) *Ibid.*

[ \*43 ] Thus, if he have used as his own, or made \*interest upon, a balance of his principal's money remaining in his hands, or if he have thus dealt with money remitted to him, he must account for such interest.(b) So if he improve such money by employing it in trade, he shall, it seems, account for the profits, and not for the interest only.(c) and if he be in a foreign country, and by reason of the course of exchange he be enabled to make a premium on a bill upon his principal;(d) or if, by order of his principal and with his money, he purchase goods, and, without giving notice to his principal of such purchase, he sell the goods again for his own benefit;(e) or if he make a profit by a clandestine sale to his principal on his own account,(f) in all these cases he must account to him for the profits so made. It appears however, that a factor or broker is not bound to invest money which he receives or holds merely on account of his principal: and it is therefore presumed that, unless by the usage of trade, or the terms of his retainer, this duty be imposed upon him, he will not be liable for the interest money which he allows to remain dead in his hands.(g) But he must be careful not to confound the money or other property of his principal which happens to be in his possession, with that which belongs to himself, because, should he do so, he will not be permitted to dispose of either, until he has satisfactorily distinguished between what is his master's and what is his own;(h) and in the event of his being unable so to distinguish between them, he will be charged with the whole.(i)

[ \*44 ] It is likewise the duty of a factor or broker to pay over \*to his principal all moneys which he may receive in his name, or as acting for him; and it has accordingly been held that, should he receive money on behalf of his principal, and deposit it in his own name in the hands of a banker, he, and not the principal, will be responsible for the loss, in the event of the banker becoming insolvent.(k) So it has been held, that if his commission be to receive a particular sum or sums of money, he is bound to pay the same over to his principal, notwithstanding any claim which may be made thereto by third persons.(l)

An insurance broker, it is said, is the agent both of the assured and of the underwriter,—he being entitled, as the agent of the assured, to receive from the underwriter the proceeds of the settlement of losses, and being bound, as the agent of the underwriter, to pay them, when received, to the assured.(m)

In remitting money to his principal, a factor or broker must follow the directions of the former; for if he do not, he will be obliged to take the risk of the remittance.(n) If no directions are given, he must

(b) *Rogers v. Boehm*, 2 Esp. 702.

(c) *Brown v. Littón*, 1 P. Wms. 139.

(d) *Diplock v. Blackburn*, 3 Camp. 43.

(e) *Vin. Ab. Factor*, B. 2. pl. 3.

(f) *Massey v. Davies*, 2 Ves. Jr. 317.

(g) *Rogers v. Boehm*, *supra*; and see judgment of Tenterden, C. J., in *Harrington v. Hogart*, 1 B. & Ad. 586.

(h) *Chedworth v. Edwards*, 8 Ves. Jr. 49, 50.

(i) *Lupton v. White*, 15 Ves. Jr. 432.

(k) *Massey v. Banner*, 1 Jac. & Walk. 241; *Wren v. Kirton*, 11 Ves. 382.

(l) *Nicholson v. Knowles*, 5 Madd. 47.

(m) *Per Bayley, J.*, in *Russell v. Bangley*, 4 B. & Al. 395, 399, (6 E. C. L. R.)

(n) *Warwick v. Noakes, Peake*, N. P. C. 67.

remitted through a banker who is in good credit at the time; or if there be a usage of trade on the subject, he must follow that.(o)

This class of agents should likewise be punctual in giving notice to their principals of all those facts and circumstances connected with the business which they have been retained to transact, by which the rights or interests of their principals may be affected. Thus we have seen, that a factor who has undertaken to effect an insurance according to the special instructions, is bound, in the event of [ \*45 ] his being unable to do so, to give his principal notice of such inability.(p) So it is his duty, when a contract of sale or purchase is concluded, to apprise his principal thereof; and it is said, that if a factor sell goods on another person's account, either by themselves or among other things, and, without having given advice to his principals of the sale, he continues to deal with the purchaser, who afterwards becomes insolvent, such factor shall be answerable for the price of the goods so sold, because he did not within a convenient time advise the owner of the sale thereof.(q) In like manner, when a factor draws on his principal he ought to advise him of his having so done;(r) and when bills of exchange are placed in the hands of a factor or broker for the purpose of his getting them accepted or negotiated, it is his duty to give all such notices as are necessary in order to save the rights of his employer on those instruments.(s)

It appears, moreover, that it may in some instances become the duty of a factor to take legal proceedings in order to obtain possession of property which has been consigned to him by his principal. This was decided in the following case. An agreement was entered into between J. L.,—as the agent of G. L.,—and the defendants, that the latter should, upon their having bills of lading filled up to their order for coffee, sugar, cotton and rum, accept bills of exchange to be drawn upon them by J. L.; and that, after deducting their advances, charges and commission, the defendants should pay the balance of the proceeds of the said goods to J. L. Upon the footing of this agreement goods were shipped to the defendants, and by the bill of lading they were made deliverable to them or their assigns, \*they [ \*46 ] paying freight. When the goods arrived however, the captain wrongfully refused to deliver them to the defendants, and they in consequence brought an action of trover against him, in which they had a verdict. G. L. became bankrupt; and his assignees having brought an action against the defendants for the value of the goods so consigned to them, the latter claimed, amongst other deductions, to be allowed the expenses they had incurred in bringing the above action of trover; and the court, after taking time to consider, gave judgment for the defendants. The bill of lading, it was observed, intitled the defendants, solely and exclusively, in the first instance, to the possession of the goods. But that possession was not to be for their own benefit only. They were to pay themselves, but so soon as their demand was satisfied their rights ceased, and whatever remained was to belong to G. L. When a wrongdoer therefore withheld possession, they had a right for themselves, and a duty towards G. L., to take

(o) Knight v. Lord Plymouth, 3 Atk. 480.

(p) Callendar v. Oelrichs, 6 Scott, 761.

(r) Beawes, Lex Merc. 43.

(q) Vin. Ab. Factor, B. 2, pl. 2.

(s) Beawes, Lex Merc. 431.



proper steps to obtain such possession; and the expense properly incurred thereby, was a charge on the goods.(t)

Lastly, it may be observed, that, in addition to the duties mentioned above, stockbrokers are bound by statute(u) to keep a book called the Broker's Book, in which they are required to enter all contracts for stock made by them on the same day, with the names of the parties, and the day of making the contract; and which book, it is enacted, they shall produce when lawfully required. A similar duty is imposed on all brokers practising in London, by the regulations made by the Court of Mayor and Aldermen of that city, to which reference has been made in the previous chapter.(v)

[ \*47 ] \*The effect of this entry as evidence of the contract between the parties has been already noticed.(x)

For the other duties imposed by these regulations on brokers practising in London, the reader is requested to consult the Appendix.(y)

## [ \*48 ] CHAPTER II.—SECTION II.

### ON THE POWERS OF FACTORS AND BROKERS.

#### PART I.

##### ON THEIR POWERS, AS BETWEEN THEMSELVES AND THEIR PRINCIPALS.

WE come now to consider those powers with which factors and brokers are clothed in order to the due execution of their several functions. These appear to divide themselves most naturally into two classes; *first*, the powers which they possess, as between themselves and their principals; and *secondly*, the powers which they possess, as between their principals and third parties; under which latter division we shall treat of the factor's power to pledge, and of the "Factor's Acts."

It may be stated as a general rule on this subject, that in questions arising under the latter of the above classes, the extent of power possessed by factors and brokers must be measured by the usual extent of their employment, and not by the private communications which may have passed between them and their principals, unless, that is, it be sought to affect third parties with a knowledge of those communications;(a) whereas, in questions arising under the former, the powers which they possess must, for the most part, depend on the terms of the

(t) *Curtis v. Barclay*, 5 B. & C. 141. 148, (11 E. C. L. R.)

(u) 7 Geo. 2, c. 8, s. 9, made perpetual by 10 Geo. 2, c. 8.

(v) See Appendix, No. 3, rule 8.

(x) *Ante*, p. 5. See also *Grant v. Fletcher*, 5 B. & C. 436, (11 E. C. L. R.); and *Thornton v. Charles*, 9 M. & W. 808. (\*)

(y) It is also enacted by stat. 47 Geo. 3, sess. 2, c. 28, s. 29, with reference to *coal factors*, that "all contracts for coals are to be fairly entered in a book to be kept by the factor, subscribed by the buyer; and a copy of such contract is to be deliver by the factor to the clerk of the market within an hour after the close of the market." As to what is a sufficient compliance with this enactment, see *Hudson v. Granger*, 5 B. & Al. 27, (7 E. C. L. R.)

(a) *Whitehead v. Tucket*, 15 East, 400; *Pickering v. Bask*, *Id.* 38. 43.

authority by which those powers were conferred. If therefore, the authority given be express and special, the instrument by which it is given must be consulted, as the index to the agent's power; (b) but where this is not the case, it is for the law to determine what powers \*are necessary and proper to be engrafted on the general [ \*49 ] authority. (c) From this, then, it is evident that, as between principal and agent, questions depending on the construction of the authority given to the latter must frequently arise; and that, even as between the principal and third parties, similar questions must require to be occasionally considered; and such being the case, it may not be improper, before entering on the main subject of this section, to state the principles on which our courts proceed in the construction of these authorities, whether general or special.

Where the authority is given by a formal instrument, such as a power of attorney, it appears that it will be construed strictly. Such instruments, it has been said, do not give general powers, except where they are necessary to carry the purposes of the special powers into effect; (d) and so it is said, that even where the largest powers are given by them, they must be construed with reference to the subject-matter. (e) On the other hand, however, it has been stated, that, although authorities of this kind are to be pursued strictly, they will, notwithstanding, even without the assistance of general words, be held to include all medium powers, that is, all the means necessary to be used in order to attain the accomplishment of the object of the principal power. "Our books," says Lord Loughborough, "say that these authorities are to be pursued strictly; but our books also say that they are to be so construed as to include all the necessary means of executing them with effect." (f)

Where the authority is conferred by informal instruments, such as letters of advice, instructions, or loosely drawn orders,—especially where these are general in their terms—\*they will be [ \*50 ] more liberally construed, according to the necessities of the occasion, and the material, or ordinary, or reasonable course of the transaction; (g) and it appears that, even where such an authority is given to an agent for his own benefit, it will not be construed strictly, provided its being liberally construed will not alter the situation of the principal. (h) But if this be the case, it will be otherwise; and therefore, where the defendant, by letter, authorized his agents B. & S., to whom he was indebted, to effect a policy of insurance on his life in their own names, and they, having subsequently taken a third party into partnership, caused the policy to be effected in the names of the three; it was held that this was not a proper execution of the authority, and that the premiums paid on this policy could not be recovered from the principal as money paid to his use. (i)

(b) 1 Bell's Com. on Mer. Jur. 387.

(c) Bell, *supra*, and see *Howard v. Baillie*, post.

(d) Per Holroyd, J., *Attwood v. Munnings*, 7 B. & C. 278. 284, (14 E. C. L. R.)

(e) *Hay v. Goldsmidt*, cited 1 Taunt. 349; per Best, C. J., *Withington v. Herring*, 5 Bing. 442. 456, (15 E. C. L. R.)

(f) *Howard v. Baillie*, 2 H. Bl. 618. 620.

(g) 1 Bell, Com. on Merc. Jur. 386.

(h) Per Maule, J., *Barron v. Fitzgerald*, 8 Scott, 460. 463.

(i) *Barron v. Fitzgerald*, *supra*.

Generally indeed, where an authority is given to two or more agents to do an act, such an authority is construed strictly; and unless it be executed by all to whom it is given, such execution will be invalid.<sup>(k)</sup> But still it would seem, that in some cases connected with mercantile transactions this rule will be relaxed. For example, where there is a joint consignment of goods to two factors for sale, each of them will, it is said, be considered to possess the whole power over such goods for the purposes of the consignment, whether they are partners or not—the mere fact of the joint consignment being taken to import a consent on the part of the consignor, that the consignees should trust one another in the business;<sup>(l)</sup> and, in like manner, it was ruled by Lord Ellenborough, that where directions had been given to G. W. & Co., [ \*51 ] of London, to effect a policy of insurance, but it \*appeared that the policy had been effected by G. W. & Co., of Liverpool, a firm consisting, with the exception of one member, of the same persons as the London house, the principal was bound by the insurance so effected.<sup>(m)</sup>

The construction of informal instruments, such as letters of advice, is, like that of other mercantile documents, for the most part left to the jury,—it being considered that, on such questions they are more likely to arrive at a sound conclusion than the court, because their knowledge of them arises from daily experience.<sup>(n)</sup>

If the instrument by which the authority is conferred be not expressed in plain and unequivocal terms, but the language in which it is couched is fairly susceptible of different interpretations, it appears that the agent will, if he have acted *bonâ fide*, and within the supposed limits of his authority, be entitled to the benefit of any doubt which may arise as its meaning. This rule holds good whether such instrument be formal or informal, and the reason of it seems to be that, in the first place, the agent is not bound at all events to discover his principal's meaning; and secondly because, the instructions having been ambiguous, the fault, in the first instance, lay with the latter.<sup>(o)</sup>

It has, however, been well observed, that where, upon the whole, the true meaning of the language used is plain, the agent will not be excused merely because another meaning might by possibility be given to it.<sup>(p)</sup> This indeed is evidently within the principle of the above rule; because, as we have already seen, the agent is bound to apply [ \*52 ] diligence \*and skill;<sup>(q)</sup> and accordingly, if it were made to appear by the testimony of men in the same profession, that to a person exercising such diligence and skill the meaning of the authority must on the whole have been free from ambiguity, it is evident that no ground could exist whereon to excuse the agent for his want of correctness in interpreting it.

The same rule is followed in equity; and accordingly, where a commission was given to a mercantile house to sell and transfer stock

(k) Co. Litt. 52 b. See also *Ib.* note 2.

(l) *Godfrey v. Saunders*, 3 Wils. 73.

(m) *Dickson v. Lodge*, 1 Stark. 226, (2 E. C. L. R.)

(n) *Per Gibbs, C. J., Lucas v. Groning*, 7 Taunt. 164. 168, (2 E. C. L. R.); and see *Chapman v. Walton*, 10 Bing. 57, (25 E. C. L. R.)

(o) See *Moore v. Mourgue*, Cowp. 430; *Story on Agency*, § 74.

(q) *Chapman v. Walton*, *supra*.

(p) *Ibid.*

"when the funds should be at 85 per cent. or above that price," such commission was construed to be a particular commission, under which the agent was bound to sell when the funds reached 85; and not a general commission, under which he might defer selling until the funds got above that price.(r)

Another principle invariably adopted in construing the authorities of factors and brokers is;—that where the authority under which they act is general, it will be held to include all the powers with which the law has clothed persons filling either of those capacities, whether such powers are incident to them because of their general character as factors or brokers,(s) or because of the usage of any particular trade,(t) or are to be inferred from the previous mode of dealing between the same parties,(u) or from the fact that the common business of the agent is to do a certain act, for instance, to sell, and that the principal has employed him in that business, without in any way limiting his authority. And as an authority conferred by a formal instrument will \*be construed to include all such medium powers as are [ \*53 ] necessary for carrying its object fully into effect,(y) so, *a fortiori*, will an authority conferred by an informal writing, or by mere general instructions, be construed to include all such powers.(z) If, therefore, it be the intention of the principal to exclude from the authority of his factor or broker any of these powers, it must be done by express directions.(a) At the same time, however, it must be borne in mind, that no authority, however general in its terms, will be construed to include any power not usually recognized as belonging to the agent to whom the authority is given; and accordingly, where a factor was instructed to deal with goods consigned to him, "at his discretion;" it was held that these words must be limited to mean a discretion in his capacity of factor only, and that, therefore, they could not be taken to confer on him a power to pledge the goods in question.(b)

Lastly: It may be laid down as an established principle, that the court will, in construing these authorities, whether they have been conferred by writing or not, admit evidence of the custom of trade, either for the purpose of explaining words used in a sense different from their ordinary meaning, or for the purpose of adding known terms not inconsistent with the authority itself.(c) Such is the rule with reference to the admission of evidence to explain mercantile contracts;(d) and it appears to be now decided that, with reference to mercantile authorities, the same rule is applicable, at least, to an equal extent.(e) Thus

(r) *Bortram v. Godfrey*, 1 Knapp. Priv. Coun. Rep. 381.

(s) *Petties v. Soame*, 13 Vin. Ab. 6; *Ambler*, 498; *E. I. Company v. Henley*, 1 Esp. 111.

(t) *Child v. Morley*, 8 T. R. 610; *Sutton v. Tatham*, 10 Ad. & E. 27, (37 E. C. L. R.); *Young v. Cole*, 4 Scott, 489, (36 E. C. L. R.); *Anon.* 12 Mod. 514.

(u) *Whitehead v. Tuckett*, 15 East, 400; *Townsend v. Ingila*, Holt, N. P. C. 278, (3 E. C. L. R.)

(x) *Pickering v. Busk*, 15 East, 38.

(y) *Howard v. Baillie*, 2 H. Bl. 620.

(z) *Fenn v. Harrison*, 4 T. R. 177; *Richardson v. Anderson*, 1 Camp. 43, note.

(a) *Fenn v. Harrison*, *supra*.

(b) *Per Abbott, J., Graham v. Dyster*, 6 M. & Sel. 1, 6.

(c) *Bell, Com. on Mer. Jur.*, 388.

(d) *Trueman v. Loder*, 11 Ad. & E. 589, 599, (39 E. C. L. R.)

(e) See observations of Denman, C. J., on the case of *Dickinson v. Lilwall*, cited 11 Ad. & E. 590, (39 E. C. L. R.)

[ \*54 ] in the case *Ekins v. \*Machish*, (f) Lord Hardwicke admitted the evidence of merchants as to what was, according to the usages of trade, the extent of an agent's authority, under the particular words of his commission. So a general authority to a factor to sell is now construed to authorize him to sell on credit, because, as it is said, constant experience proves that factors do sell upon credit, without any special authority. (g) On the other hand, it is clear that a general authority to a broker to sell stock will not be construed to authorize him to sell it on credit, because a broker is employed to sell only in the usual manner, and he has no power in common cases to give credit for the price of stock which he agrees to sell. (h) But, where a general authority was given to a broker employed in the Irish provision trade to sell a quantity of butter, it was held that evidence was admissible to prove that, by the usage of that trade, such an authority expired with the day on which it was given. (i) And where a corn merchant in Ireland sent written instructions to a broker and *del credere* agent in London to sell oats of a certain quality at a certain price on his (the merchant's) account; it was held that evidence was admissible to show that by the custom of the London corn trade, a broker was warranted by such instructions in selling in his own name, Denman, C. J., observing; that the court was "not prepared to say that evidence of the custom of London might not have a reasonable influence on the minds of the jury, towards fixing the sense of the broker's authority, if in itself doubtful." (k) So it is said, that in the case of a foreign factor, his authority will be construed to include full powers to transact the business of his principal in the forms, and by the instruments, and according to the laws of the country in which the factor resides. (l)

[ \*55 ] \*All these decisions are manifestly founded on the principle, that where an agent is employed to do any act, he shall be supposed to have an authority to do it in the manner in which it is usually done, (m) and do not at all infringe upon the rule, that evidence should not be admitted to vary the effect of a written document. To admit such evidence in the latter case, would be to set up something inconsistent with the document itself; whereas, to admit it in the former, is merely to give expression to what may fairly be presumed to have had a place in the mind of the principal at the time he conferred the authority, and to have influenced the judgment of the agent in interpreting the degree of power conferred on him thereby.

It is likewise presumed,—judging, that is, from analogous cases,—that if a factor or broker were authorized in writing to buy or sell goods at a fixed price, and a subsequent verbal authority were give him to buy or sell different goods, or the same goods at a different price, evidence of such latter authority would be admissible in order to discharge him from liability under his previous instructions. (n)

(f) *Ambler*, 186.

(g) *Per Chambre, J.*, *Houghton v. Matthews*, 3 Bos. & Pul. 489; *Scott v. Surman*, Wil. 407.

(h) *Wiltshire v. Sims*, 1 Camp. 258.

(i) *Dickinson v. Lilwall*, 4 Camp. 279.

(k) *Johnston v. Osborne*, 11 Ad. & El. 549, 557, (39 E. C. L. R.)

(l) *Story Com. on Agency*, § 86.

(m) See 1 Camp. 260, note.

(n) See observations of Lord Abinger, in *Adams v. Wordley*, 1 M. & W. 374, 380. (o)

Here again there would appear to be no infringement of the rule against the admission of evidence to vary a written instrument; because, as a man do not vary the terms of a contract by making another collateral one,<sup>(o)</sup> so he cannot be said to vary the terms of an authority by giving another collateral one; and consequently, when evidence of such collateral authority is received, this is not for the purpose of showing that the original authority was other than it purports to be, but in order to establish a new one which is wholly independent of it.

Acting on these principles of construction, our courts have held, that a factor, by his general commission, has authority [ \*56 ] \*to sell in his own name,<sup>(p)</sup> and also, as we have already stated, to sell on credit.<sup>(q)</sup> The credit given by the factor, however, must be reasonable and customary; and the security which he takes from the purchaser must be of such a nature as that the principal may avail himself of it by the exercise of reasonable diligence, and without being exposed to extraordinary risk or trouble.<sup>(r)</sup>

On the other hand, a factor has no authority under his general commission to dispose of the goods of his principal by way of barter, and should he do so, the principal's property in them will not be divested, but he may still maintain trover for them against the party with whom they were bartered, although the latter did not know that in the transaction in question, he was dealing with a factor only.<sup>(s)</sup>

So by the common law, a factor commissioned to sell goods, had no authority to pledge them, either by depositing the goods themselves,<sup>(t)</sup> or by indorsement and delivery of the bill of lading, or any other symbol of property in such goods.<sup>(u)</sup> Nor, if the transaction between the factor and a third party amounted in fact to a pledge, although in some respects it might resemble a sale, was it held to be binding on the principal.<sup>(x)</sup> This, however, was considered a hard doctrine,<sup>(y)</sup> and it has of late been much modified by statutory enactments; but it is, nevertheless, worthy of notice, as illustrative of the principles upon which such questions have been decided; for, the reason of the doctrine that a \*factor had no right to [ \*57 ] pledge, was, "because it was out of the usual and ordinary course of dealing."

Upon this principle it is that, unless where the strictness of the rule has been relaxed by statute, a factor's general commission is still construed to confer such powers only as are sanctioned by usage; and therefore, where the plaintiffs consigned goods to their factors, who, not having funds to pay the freight and duties, agreed with the defendants that they should take charge of the consignment, pay the

(o) Per Lord Abinger, *ibid.*

(p) *Baring v. Corrie*, 2 B. & Al. 137. 143.

(q) *Com. Dig. Merchant, B.*; *Houghton v. Matthews*, 3 Bos. & P. 489.

(r) *Barton v. Sadock*, Bulstr. 103; *Beawes*, *Lex Merc.* 41; 2 *Kent, Com. on Amer. Law*, 622, 623.

(s) *Guerreiro v. Peile*, 3 B. & Al. 616, (5 E. C. L. R.)

(t) *Patterson v. Tash*, 2 Stra. 1178.

(u) *Newsom v. Thornton*, 6 East, 17; and see *Phillips v. Huth*, 6 M. & W. 572. 596. (\*)

(x) *Shipley v. Rymer*, 1 M. & Sel. 484.

(y) Per Lord Ellenborough, *Pickering v. Bask*, 15 East, 44.

freight and duties, sell the goods, and have one-half of the usual commission on such sale; and the defendants accordingly paid the freight and duties, and received the goods; after which the factors became bankrupt, having before informed the defendants that the goods were the plaintiff's; but the defendants notwithstanding sold the goods;—it was held, in trover by the plaintiffs against the defendants, that the latter had no right to retain for the freight and duties so paid, after deducting the balance due from the factors to the plaintiffs at the time of the bankruptcy; Lord Ellenborough observing, that the consignors of the goods had nothing to do with what passed between the factors and the defendants, in contravention of the trust reposed in the former.<sup>(z)</sup> And in another case, very similar to the last, the law was thus stated by the same learned judge. "A principal employs a broker, from the opinion he entertains of his personal skill and integrity; and a broker has no right, without notice, to turn his principal over to another of whom he knows nothing. It appears to me, therefore, that there is no privity either express or implied, between the parties. There certainly was not any express privity; neither can any be implied, unless the case had found that the usage of trade was such as to authorize one broker to put the goods of his employer into the hands of a sub-broker to sell, and to divide commission with him."<sup>(a)</sup>

[ \*58 ] \*It likewise appears from these cases, that a factor has no power to delegate his authority, unless with the consent of his principal, or in accordance with the usage of trade.<sup>(b)</sup>

A factor's general authority to sell, however, is held to include the power of doing so by indorsing the bill of lading to a *bona fide* purchaser, even although the goods are at sea at the time the indorsement is made;<sup>(c)</sup> but it appears that, in order to entitle the factor to sell in this manner, the bill of lading must be indorsed to him by the consignor, as, in general, the transfer by a factor of an unindorsed bill of lading will not pass the property.<sup>(d)</sup> Still, however, even when the bill of lading has not been actually indorsed to the factor, it may come to his hands accompanied by circumstances which may amount to an indorsement thereof, and where this is the case, he will have full power to transfer it, and thereby to sell the goods.<sup>(e)</sup> And such indorsement of the bill of lading by the factor to a *bona fide* purchaser will bind his principal, so as to divest him of the right of stopping the goods *in transitu*.<sup>(f)</sup>

In like manner, where the factor has a general authority to sell, he is held to have the power of warranting the goods to be sold,<sup>(g)</sup> or of selling them by sample, if such be the custom of the trade.

(z) *Solly v. Rathbone*, 2 M. & Sel. 298.

(a) *Cockran v. Irlam*, 2 M. & Sel. 301. It will be observed that the term broker is here used; but on reference to the case it will be found, that the parties acted as factors rather than as brokers in the transaction in question.

(b) See also 1 Bell, Com. on Merc. Jur. 398. (c) *Wright v. Campbell*, 4 Burr. 2046; Per Lord Loughborough, *Mason v. Lickbarrow*, 1 H. Bl. 367; and see observations of Ellenborough, C. J., *Newson v. Thornton*, 6 East, 41.

(d) *Nix v. Olive*, cited *Abbott on Shipping*, 489, sixth edition.

(e) *Dick v. Lumsden*, *Peake's N. P. C.* 189.

(f) *Wright v. Campbell*, *supra*; *Mason v. Lickbarrow*, *supra*; *Abbott on Ship.* 474, sixth edition.

(g) Per *Bailey, J.*, *Pickering v. Bush*, 15 East, 38. 45.

So he has power to receive payment for goods which he sells, and to give receipts for such payments; (h) but [ \*59 ] he can receive payment only in the manner which is warranted by the usual course of trade; (i) nor has he any power without an express authority to that effect, or unless the usual course of trade will justify him in so doing, to receive payment by taking security from the purchaser in his own name, and if he do so, and the purchaser fail, he shall, it is said, be answerable for the loss. (k) So if the factor take notes from the vendee, payable to him at a future day, and fail, and his assignees afterwards receive the money due on such notes, the principal may recover it from the assignees in an action for money had and received. (l) So a factor has no power under his general commission to commute a payment by receiving something instead of money, for example, goods, in discharge of the debt; (m) nor can he compound the debt, or release it on payment of a composition. (n)

There are, moreover, cases in which even payment to a factor will not bind the principal; but these will be more properly considered when we come to treat of the powers which he possesses, as between his principal and third parties.

When a factor has a general authority to purchase, he must be considered as having power to do so according to the best of his judgment, and without limitation as to price; (o) and it seems that even when a price is named in his instructions, he must be so expressly limited to that price as not to be led to consider that he has a discretionary power to go beyond it; for if this be not done, the principal will be bound by a purchase, although at a price greater than that mentioned in the instructions. (p)

\*A general authority to a foreign factor to purchase, [ \*60 ] empowers him to load the goods purchased generally, so as to bind them for the freight. (q) The rule is thus laid down by Beawes: "A factor who enters into a charter party with a master for freightment, is obliged by the contract: but if he lade aboard generally, the goods, the principal and the lading, are ~~not~~ liable for the freightment, and not the factor." (r)

A factor, it appears, has no power, without a special authority to that effect, to accept or indorse bills so as to charge his principal; (s) but it has been decided in America, that when a factor has a general authority to purchase, he may, if no other funds are provided, give notes, or draw and negotiate bills on his principal for the amount. (t)

It is a settled principle in our law, that no man should be allowed to have an interest against his duty; (u) and it has accordingly been

(h) *Drinkwater v. Goodwin*, Cowp. 256; *Capel v. Thornton*, 2 C. & P. 352, (12 E. C. L. R.); and see *Sykes v. Giles*, 5 M. & W. 645. 651. (\*)

(i) *Thorold v. Smith*, 11 Mod. 71. 88; and see 6 Geo. 4, c. 94, s. 4.

(k) *Com. Dig. Merchant, B.*

(l) *Scott v. Surman*, Willes, 400.

(m) *Howard v. Chapman*, 4 C. & P. 503, (19 E. C. L. R.); *Doc. & Sta. 286.*

(n) 3 *Chitty on Com. and Manuf.* 208.

(o) *Beawes, Lex Merc.* 41.

(p) *Hicks v. Hankin*, 4 Esp. 114.

(q) *Bell. Com. on Merc. Jur.* 387.

(r) *Beawes, Lex Merc.* 43.

(s) *Hogg v. Snaith*, 1 Taunt. 347; *Murray v. East India Company*, 5 B. & Al. 204, (7 E. C. L. R.)

(t) *Perrotin v. Cuculla*, cited *Story on Agency*, § 103.

(u) Per Lord Ellenborough, *Thompson v. Havelock*, 1 Camp. 527, 528.



held, that an agent employed to purchase, cannot be himself the seller; nor, if he be employed to sell, can he be himself the buyer, unless there be an express understanding to that effect between him and his principal. The reason of this is plain, inasmuch as the duty of the agent to buy or sell in such a manner as would be most beneficial to his employer, is obviously inconsistent with those motives of self interest, in obedience to which his being permitted to assume the character of seller or purchaser, would tempt him to act. This rule is well illustrated by the following case.

[ \*61 ] A broker, who was employed by a customer to sell foreign \*stock on a day specified in his letter of instructions, purchased the stock in the name of his partners, a firm in Paris, at the market price of the day. Being also employed to purchase foreign stocks and bonds for his customer according to his, the broker's, recommendation, he transmitted accounts of the transactions to his employer, with broker's notes, &c., as if he had purchased the stock of third persons. The fact, however, was, that no stock or bonds were purchased, no transfers made, and no broker's notes passed, but that the sales were nominal,—being, in fact, sales of stock and bonds remaining in the hands of the broker and his partners, and not set apart or appropriated to the customer. In order to effect these purchases, loans of money were made by the broker to the customer, upon an agreement that the stock and bonds should remain in the hands of the former, to secure the repayment of the money advanced. The stock and bonds were afterwards sold at a loss, under the broker's advice. In 1819 an account of these transactions were rendered and settled between the customer and the broker, and great loss having been incurred thereupon, a large balance was paid by the former to the latter; but upon a bill filed some years afterwards, all the transactions were set aside, and an account decreed against the agent. This decree was subsequently affirmed on appeal.(x)

A factor, to whom goods are consigned for sale, has, it would appear, the power of effecting an insurance on such consignment, not only for himself, to the extent of his commission in respect thereof,(y) but also for his principal, on the full value of the goods.(z) The latter part of this \*proposition cannot indeed be laid down [ \*62 ] as absolutely settled by our law, there being, it is believed, no express decision to that effect. But in the cases cited, especially in that of *Lucena v. Crawford*, the subject was introduced both during the arguments at the bar, and by the learned judges in delivering their opinions from the bench; and, although they were not agreed as to the reasons on which a factor or consignee for sale should be taken to possess the power in question, yet no doubt seemed to be

(x) *Rothschild v. Brookman*, 5 Bligh, N. S. 165; 2 Dow. & Clark. 188. By statute 31 Geo. 2, c. 4, s. 11, salesmen, brokers, or factors employed to buy or sell cattle in London, are expressly prohibited from buying or selling on their own account, except for the use of their families.

(y) Per Lord Kenyon, *C. J.*, *Flint v. Le Mesurier*, cited 2 Park on Mar. Insur. 563; see also *Barclay v. Cousins*, 2 East, 544.

(z) *Lucena v. Crawford*, 3 Bos. & Pul. 75. 95. 105; *Crawford v. Hunter*, 8 T. R. 13. 22; and see the dicta of Lord Ellenborough and Mr. Justice Le Blanc, *Stirling v. Vaughan*, 11 East, 619. 628. 631.

entertained by them as to the fact. On this point, indeed, the majority of the court expressed themselves very strongly, not even resting the authority of the factor in this particular, on the ground of his possessing any beneficial interest in the property insured, but seeming to consider it as a natural incident to the fact of his being clothed in the character of agent or consignee.(a)

The case of *Lucena v. Crawford* was afterwards removed by writ of error into the House of Lords; and the question of the authority of a consignee for sale, to insure the property consigned to him without orders to that effect, was again brought under review. On that occasion, as on the former, the opinions of the judges were decidedly in favour of such authority;(b) but as was the case in the court below, they did not appear to be agreed as to the reasons on which it was founded. Perhaps, however, the true reason was that stated by Lawrence, J. "Interest," says he, "does not necessarily imply a right to the whole; but where a man is so circumstanced with respect to matters exposed to certain risks or dangers, as to have a moral certainty of advantage or benefit but for those risks or dangers, he may be said to be interested in the safety of the thing."(c) This the learned judge considered to be the case of a factor or [ \*63 ] \*consignee for sale, and he was therefore of opinion that, by reason of such interest, he had power to insure to the full value of the goods consigned to him.

It has also been said that a factor has, in such a case, the power of insuring either in his own name, or in that of his principal, and that if he adopt the former of these methods he will be entitled in the event of a loss, to recover the whole value of the subject of insurance from the underwriters. Should he do this, he will of course become a trustee for his principal for all beyond the amount of his own interest.

And not only does a factor to whom goods are consigned for sale appear to possess this power, but it seems that circumstances may occur, under which a factor will be justified in effecting an insurance on a cargo consigned by his principal to third parties, and of which consignment the factor has merely been advised by receiving the bill of lading and invoice, with instructions to transmit them to the consignees. This was decided in the following case. The plaintiffs were the general agents in London of one L. a merchant in Norway. L. contracted with certain persons who carried on trade in London under the firm of the Cudbear Company, to supply them with quantities of moss. He accordingly shipped a cargo of moss consigned to the said company, and upon their account and risk transmitted to the plaintiffs the invoice and bill of lading of the same, with instructions to hand them to the company, that they might "have an opportunity of insuring the cargo, the season being so far advanced." L. also drew a bill of exchange on the company for the amount of the cargo, and remitted the same to the plaintiffs to procure the acceptance thereof. The company, however, after having received through the hands of the plaintiffs the said bill of lading, invoice, and bill of

(a) *Lucena v. Crawford*, supra, 95.

(b) *Lucena v. Crawford*, in Error, 2 Bos. & Pul. N. R. 269. 290—303.

(c) 2 Bos. & Pul. N. R. 302.

exchange, refused to accept the bill, or take to the cargo, or insure the same. The plaintiffs therefore, without any order so to do, caused [ \*64 ] the cargo to be insured, and the court \*held that they were justified in so doing.(d) It is true indeed, that in the case just cited the factor had informed his principal of what he had done, and the latter had adopted the act, but this circumstance does not appear to have had much influence on the opinion of the court, for Buller, J., in delivering judgment, says;—"a general agent has a right to exercise his discretion for the benefit of his principal; he must act on the spur of the occasion; and if nothing else had passed, I have doubts whether the principal would not have been liable to pay the premium."(e)

At all events, if the factor were, under circumstances such as the above, interested to any extent in the cargo, he would have an undoubted right to insure to the amount of his interest. Thus in the the above case it appeared that, at the time L. transmitted the bill of lading and invoice to the plaintiffs, he advised them that he had drawn on them for £300, which bill was by the plaintiffs accepted and afterwards paid; and it was held that they had "a clear right to insure to the amount of £300, for which they were interested in the goods."(f)

Such it is believed are the chief powers possessed by a factor, as between himself and his principal. The powers of a broker are somewhat more limited. This circumstance arises from the fact of their being, as we have seen, treated merely as middle men between the contracting parties;—they are not, in general, intrusted with the possession of the property respecting which they are employed to contract; and as a necessary consequence of this, they want many of those powers with which a factor is clothed, merely from the fact of their being so interested. Keeping then this distinction in view, [ \*65 ] let us now proceed to consider what are, as \*between himself and his employer, the principal powers which a broker possesses.

A broker employed to sell or purchase has no authority, under his general commission, to contract in his own name.(g) Brokers, acting as such within the city and liberties of London, are, by the regulations in force in that city with respect to them, expressly prohibited from so doing.(h) They may however contract in their own names, provided their principals have given them authority to that effect,(i) or if the usual course of dealing warrants them so to do.(k)

With respect to an insurance broker the rule is different—he having in all cases the power to effect a policy in his own name, on behalf of his principal. Formerly indeed it was unlawful for any person residing in Great Britain to cause an insurance to be made, without inserting in the policy either his own name, or the name of the person who effected the policy as his agent; and when the person interested resided out of Great Britain, the name of the agent was in

(d) *Wolff v. Horncastle*, 1 Bos. & Pul. 316.

(e) *Wolff v. Horncastle*, *supra*, 323.

(f) Per Buller J., *ut supra*.

(g) *Baring v. Corrie*, 2 B. & Al. 137.

(h) For these regulations see Appendix.

(i) *Kemble v. Atkins*, 7 Taunt. 259, (2 E. C. L. R.)

(k) *Baring v. Corrie*, *supra*.

every case required to be inserted.<sup>(l)</sup> But this is now no longer necessary, it having been enacted by the 28 Geo. 3, c. 56, that a policy of insurance will be good if effected in the name or the usual style or firm of dealing of the person residing in Great Britain who shall receive the order for and effect such policy; and indeed it appears that since the passing of this statute, it is not requisite for the broker, who effects the policy, even to describe himself as "an agent." This point was decided in the following case. An action was brought on a policy of assurance effected in the name of G. M. & Co., who were the plaintiff's brokers. The plaintiff as well as the [ \*66 ] brokers resided in London. The latter were not called "agents" in the policy, but in the declaration were stated to be "the persons residing in Great Britain who received the order for and effected the said assurance." Interest in the plaintiff was averred. On the trial of the cause a verdict was found for the plaintiff; but the court afterwards granted a rule *nisi* for a nonsuit on an objection to the form of the policy—that objection being, that it did not sufficiently comply with the provisions of the 28 Geo. 3, c. 56, because it was effected in the name of G. M. & Co., without stating them to be the agents of the parties interested. On the case being called on for argument however, Lord Kenyon said that he was surprised to find that the rule had been drawn up, as there was really nothing in the objection, and accordingly, the rule, without argument, was discharged.<sup>(m)</sup>

Prima facie, a broker is the agent only of the person who employs him;<sup>(n)</sup> but where he is employed to sell goods for any person, and he agrees with another for the sale of them to him, he is to be considered as the agent both of the purchaser and his employer, and as such agent he has power to sign the sold-note, so as to bind both parties within the statute of frauds.<sup>(o)</sup> So where a broker is told by two parties, that he is to act as their broker to make a contract between them for the sale of goods; and he in consequence re- [ \*67 ] duces such contract into writing, and sends a note of the terms to each, he becomes their agent, so as to bind both within the statute.<sup>(p)</sup> And it seems that if a broker be authorized by one person to sell goods, and by another to buy them, an entry in his book of the sale of those goods will bind both under the statute.<sup>(q)</sup> So, it appears, that if a broker make an entry of a contract in his book, which he does not sign, but afterwards sends to the vendor and purchaser bought-and-sold notes copied from the book and signed by him, these notes will constitute a sufficient memorandum of the bargain,

(l) Stat. 25 Geo. 3, c. 44; *Pray v. Edie*, 1 T. R. 313.

(m) *De Vignier v. Swanson*, 1 Bos. & Pul. 346, note b. It has also been held under the same statute, that a declaration on a policy effected as in the case of *De Vignier v. Swanson*, would at all events be good after verdict, *Mellish v. Bell*, 15 East, 4; and that if the broker were described in the policy merely as an agent, that would be clearly sufficient. *Bell v. Gilson*, 1 Bos. & Pul. 345. The usage of trade however, is, it is believed, quite in conformity with the law as laid down in the case cited in the text; but still, if a more particular description be inserted in the policy, and stated in the declaration, it will have to be proved as laid. *Bell v. Janson*, 1 M. & Sel. 201.

(n) Per *Ellenborough, C. J.*, *Kinnitz v. Surry*, cited *Payley on Agency*, 171,

(o) *Rucker v. Cammeyer*, 1 Esp. 105; and see *Simon v. Motivos*, 3 Burr. 1931.

(p) *Chapman v. Partridge*, 5 Esp. 256.

(q) *Hayman v. Neale*, 2 Camp. 337.

and the parties will be bound by the contract so made.(r) And in like manner it has been held, that if a broker make a contract with the vendor for the purchase of goods, and deliver by mistake a bought-note to each party, without mentioning his principal's (the buyer's) name, but makes a proper entry of the contract in his book, the buyer will be entitled to maintain an action for the breach of the contract.(s) So it appears that the broker's note will bind both parties without their being an entry made in his book.(t)

We have seen that a factor has, in general, full authority to sell on credit; and in like manner it has been said, that where goods, for the sale of which a broker has previously contracted, are consigned to him by his principal, the law will not imply a duty on his part, resulting merely from his character as a broker, to keep such goods in his [ \*68 ] hands until they are paid for by the purchaser.(u) But when the terms of the contract are, that the goods are to be paid for on delivery, the broker has no authority to part with them except on payment of the purchase-money;(x) nor has he this authority in any case in which, as in the case of sales on the Stock Exchange, a sale on credit would be contrary to the usage of trade.(y)

Where a broker is employed to buy or sell, without limitation as to price, he may use his discretion as to price for which he buys or sells; and, it is presumed, that if he were instructed to sell goods without any express direction as to the mode, he would be held to have the power of selling them by sample or with warranty. This indeed would seem to follow from the principle—that where a party employs an agent to do a certain act, without restraining his authority as to the mode of doing it, he must be bound by that mode which the agent, in the exercise of his best judgment adopts.(z)

A broker has, in general, no authority as such, to receive payment for goods sold by him on account of his principal;(a) but if the custom of trade, or the usual course of dealing between himself and his principal warrant him so to do, he may receive payment for goods so sold.(b) Even in these cases, however, he must, like a factor, receive payment in the usual way; and he has no power to vary the terms of payment after the bargain is completed.(c)

(r) *Goom v. Alfalo*, 6 B. & C. 117, (13 E. C. L. R.)

(s) *Gale v. Wells*, 1 C. & P. 388, (11 E. C. L. R.)

(t) *Dickenson v. Lilwall*, 4 Camp. 279. As to the form of these notes, and what they should contain see ante, p. 4. As to the circumstances which will render them insufficient under the statute of frauds, see *Smith v. Sparrow*, 2 C. & P. 544, (12 E. C. L. R.) 4 Bing. 84, (13 E. C. L. R.); *Grant v. Fletcher*, 5 B. & C. 436, (11 E. C. L. R.) As to what will constitute such a variance as to avoid the contract, see *Thornton v. Kempster*, 5 Taunt. 766, (1 E. C. L. R.); *Maclean v. Dunn*, 4 Bing. 722, (15 E. C. L. R.)

(u) *Boorman v. Brown*, 4 Per. & Dav. 401.

(x) *S. C.*, in Error, 11 Law Jour. Excheq. Cham. Rep. 437.

(y) *Wiltshire v. Sims*, 1 Camp. 258; *Henderson v. Barnwell*, 1 Y. & Jer. 387.(\*)

(z) See *Fenn v. Harrison*, 4 T. R. 177.

(a) *Campbell v. Hassell*, 1 Stark. 233, (2 E. C. L. R.); and see dictum of *Coltman, J.*, *Jackson v. Jacob*, 5 Scott, 79. 86, and of *Littledale, J.*, *Mynn v. Joliffe*, 1 M. & Rob. 326.

(b) *Baring v. Corrie*, 2 B. & Al. 137. 147.

(c) *Blackburne v. Scholes*, 2 Camp. 343; *Campbell v. Hassell*, supra; *Coates v. Lewis*, 1 Camp. 444.

\*So a broker cannot, without the assent of his principal, either express or implied, delegate his authority.(d) [ \*69 ]

We have already seen that it is the duty of a broker in all cases, to transact the business of his principal in accordance with the usages of trade; and that his authority will always be construed in such a manner as to give him the power of so doing. But this rule has been carried even further; and accordingly, it appears that not only has a broker the power of following the usages of trade in conducting the immediate business of his employer, but that he likewise possesses this power with reference to matters collateral to such business, and arising out of it; and that, whether his employer was acquainted with those usages or not. The following case will illustrate this principle.

The plaintiff, a broker, was employed by the defendant sell certain instruments called *Guatamala bonds*. He sold them accordingly to one B., who paid him the market price, which he handed over to the defendant. A few days after the sale B. returned the bonds to the plaintiff, he having discovered that by reason of their not being stamped, they would not be recognized by the government by which they purported to have been issued. The plaintiff thereupon, without any previous communication on the subject with the defendant, refunded to B. the sum he had paid for them; and his reason for doing so was, that, by the custom of the Stock Exchange, brokers dealing in foreign funds act as principals, and are liable to be expelled if they do not make good their differences. The plaintiff accordingly brought this action to recover the money so paid to B., and the jury gave a verdict in his favour, which the court refused to disturb:—on the ground that, when the plaintiff received authority from the defendant to sell the bonds, he must be taken to have received an implied authority to act as all brokers \*did on similar occasions, [ \*70 ]—namely, to rescind the contract, if the article delivered turned out not to be the article sold.(e)

And so in a recent case in which a broker had, in compliance with the rules of the Stock Exchange, paid certain differences resulting from a contract into which he had entered for his principal; he was held to be entitled to recover from him the money so paid; because, as was well observed, a person who employs a broker must be supposed to give him authority to act as other brokers do in like cases.(f)

We have already seen that a broker who is instructed to effect a policy of insurance, has the power of subscribing it in his own name. It was, moreover, the opinion of Lord Ellenborough, that where an agent has authority to subscribe a policy, he may likewise adjust it;(g) and it is believed that the usage accordingly is, for the broker who effects the policy to settle with the underwriters any loss which may happen thereupon.

(d) Per Hullock, B., & Vaughan, B., *Henderson v. Barnewell*, 1 Y. & Jer. 387. 394, 395.(\*)

(e) *Young v. Cole*, 4 Scott, 489, (36 E. C. L. R.)

(f) *Sutton v. Tatham*, 10 A. & El. 27. 30, (37 E. C. L. R.) This case may be considered as overruling that of *Child v. Morley*, 8 T. R. 610, so far as it relates to the question in the text.

(g) *Richardson v. Anderson*, 1 Camp. 43: note a.

An insurance broker is also empowered by his general authority to receive payment of any loss which may occur on a policy which he has effected, provided the instrument remain in his hands; (h) and in this, as in other cases, the possession by the broker of the principal authority will be held to give him all those medium powers which are requisite in order to enable him duly to execute the same. If, therefore, it appear that the broker has been in the habit of settling losses [ \*71. ] for his principal, which the latter has afterwards \*paid, this will be considered sufficient evidence of an authority in him, to refer a dispute concerning any such loss to arbitration. (i)

But a broker has no general authority to pay losses for the underwriters by whom he is employed. (k)

In what has been already said respecting the powers of factors and brokers, it must have been observed, that many of these powers exist solely by virtue of, and are regulated entirely by the usages of trade. As was well observed however by the late Lord Tenterden, (l) "every mercantile practice of frequent use, and even of general convenience, is not, and ought not to become in all its consequences, a part of the law of the land;" and on this principle our courts have reserved to themselves the right of judging of the reasonableness of those usages, and of allowing or disallowing them accordingly. (m)

As an instance of this, in connection with our present subject, we may mention the cases in which it has been questioned whether an usage which was proved to prevail in London, for a bill-broker to have the power of pledging the bills of different customers in one mass, on account of an antecedent debt due from himself to the pledgee, was a valid usage or not. This point arose in the cases of *Haynes v. Foster*, (n) *Foster v. Pearson*, and *Stephens v. Foster*; (o) and in the second of these cases, Parke, B., in delivering the judgment of the court, is reported to have said, that \* "there [ \*72 ] was nothing unreasonable in such a practice;" but as the question at issue was settled on another ground, no express decision was given on the subject. It appears however that the court were clearly of opinion, that an usage whereby a bill-broker was authorized to pledge the bills of his customers in a mass, for an advance made to him on account of such pledge, was valid; that the usage having been proved, the principal must be taken, from its general notoriety, to have employed the bill brokers with reference to the usage; and that the latter had therefore authority, as between them and their employers, to pledge the bills in the manner they had done. "A bill-broker," it was said, "is not a character known to the law with certain prescribed duties; but his employment is one which depends entirely on the course of dealing. It may differ in different parts of the country; it may have powers more or less extensive in

(h) *Shee v. Clarkson*, 12 East, 507. 511; *Todd v. Reid*, 4 B. & Ald. 310, (6 E. C. L. R.)

(i) *Goodson v. Brooke*, 4 Camp. 163.

(k) *Bell v. Auldjo*, 4 Doug. 48.

(l) *Treatise on Shipping*, 472, sixth edition.

(m) See also 1 Bell Com. on Merc. Jur. 390, where it is laid down by that learned writer, that three things are necessary to settle a usage, as a rule of the law merchant, 1. Proof of the usage; 2. The legality of it, or at least, that it is not inconsistent with the common law, but an allowable deviation from it, and 3. The allowance of the custom judicially.

(n) 2 Crom. & M. 237. (\*)

(o) 1 C. M. & R. 849. (\*)

one place than in another; what is the nature of its powers and duties in any instance is a question of fact; and is to be determined by the usage and course of dealing in the particular place;" and on these grounds it was held, that the jury were, on proof of the usage, warranted in inferring that the broker had the authority in question.(p)

But unless there be an usage to the contrary, it is clear that a bill-broker who receives a bill merely for the purpose of procuring it to be discounted for his customer, has no right to mix it with bills of his other customers, and to pledge the whole as a security for an advance of money;(q) and the reason of this is plain,—inasmuch as it is not one of those medium powers, which are necessary to the execution of the chief object of his commission, although it might, in some cases, considerably facilitate such execution. Indeed it appears, that the only powers which the broker possesses for this purpose, under his general commission, are the \*power of indors- [ \*73 ] ing the bill in the name of his principal;(r) and, perhaps, that of indorsing it in his own name although it were not indorsed by his principal, provided such indorsement were necessary towards his procuring it to be discounted.(s)

Lastly: it is the opinion of some very eminent writers, that a factor or broker will, in all cases, be considered to have the power of pursuing what may be termed the substance of his authority. Thus, it is said, that if a factor were commissioned to make a consignment of goods, and were to buy part at one time, and part at another, although from different persons, this would be considered a good execution of his authority; or that if he were to find that he could not purchase the whole at the price limited by his instructions, he would be held to have authority to purchase such part as he could. In like manner it is said, that if a broker were authorized to buy a certain number of shares of stock, he might treat with one holder for part, and that the contract so made would be good, even although he were unable to purchase the residue. And so, it is said, that if he were instructed to procure an insurance for so much, on a particular ship, and after one or more of the underwriters had subscribed the policy, the remainder were to refuse the risk, his authority would be held to be well executed as to those who had subscribed, and his principal would be liable for the premiums.(t)

(p) *Pearson v. Foster*, *supra*, 858—861.

(q) *Haynes v. Foster*, *supra*, 239.

(r) *Fenn v. Harrison*, 4 T. R. 177.

(s) *Ex parte Robinson*, Buck, Bankruptcy Cases, 113; cited Bayley on Bills, 72, 5th edition, where the same doctrine is stated.

(t) 2 Kent, Com. on Amer. Law, 619; Story on Agency, § 170. Questions of this nature, however, do not seem to have arisen very frequently in our courts, with reference to cases of mercantile agency. They form indeed more properly, a part of the law relating to powers; for which see Sugden on Powers, (Law Library) chapter 5.



## [ \*74 ] \*CHAPTER II.—SECTION II.

## ON THE POWERS OF FACTORS AND BROKERS.

## PART II.

## ON THEIR POWERS AS BETWEEN THEIR PRINCIPALS AND THIRD PARTIES.

HAVING thus seen what powers are possessed by factors and brokers as between themselves and their principals, we now proceed to the second branch of our inquiry, namely ;—what are the powers which they possess, as between their principals and third parties ; and in pursuing this inquiry we propose to show ; *first*, the powers which they possess to bind their principals by contracts ; *secondly*, by acts done in connection with those contracts ; and *thirdly*, to state what acts of third parties dealing with them in the course of their employment will bind their principals.

The power of any agent to bind his principal to third parties depends, as we have already said, on the extent of the agent's usual employment. If he be a general agent, the principal will be bound by all acts done by him within the scope of his ordinary employment, whether such acts were warranted by his private instructions or not ; but if he be a special agent, the principal will be bound only whilst the agent acts according to his particular commission or authority. (a) The distinction between these two kinds of agents is thus stated by a learned judge : " If a person be appointed a general agent, the principal is bound by his acts. But an agent constituted for a particular [ \*75 ] purpose, and under \*a limited and circumscribed power, cannot bind the principal by any act in which he exceeds his authority, for that would be to say, that one man may bind another against his consent." (b)

Such then being the difference between the power of a general and that of a special agent to bind his principal, it becomes material to inquire,—what is the meaning of the term general agent, and how may such agency be constituted ?

It is believed that none of the cases in our books, which have reference to the powers of general agents, contain an express definition of that term ; but a comparison of the various decisions and dicta which are to be found on the subject would seem to lead to the conclusion, that by the term general agent, in our law, is meant ; either, first, a person who is appointed by the principal to transact all his business of a particular kind ; or, secondly, an agent who is himself engaged in a certain trade or business, and who is employed by his principal to do certain acts for him in the course of that trade or business. In both these cases the agent will,—if there be no limitation

(a) *East India Company v. Hensley*, 1 Esp. 112 ; *Wayland's case*, 3 Salk. 234 ; *Beckton v. Arliden*, ib.

(b) *Per Buller, J.*, *Fenn v. Harrison*, 3 T. R. 757. 762.

of his authority known to third parties,—be taken, as to them, to be a general agent, and will, therefore, have the power to bind his principal by all contracts entered into with them, which are within the scope of his ordinary employment.(c)

The reason of this rule is, that strangers can look only to the acts of the parties, and not to the private communications which pass between a principal and his agent; and this being the case, it follows, that where the principal has on former occasions authorized or recognized similar acts of his agent, or where the agent himself is employed in a certain business, and is retained by the principal to [ \*76 ] do certain \*acts for him in the usual course of that business, strangers who have no notice to the contrary will be at liberty to assume that, in the one case, the principal has, in the transaction in question, accredited the agent to the full extent of his previous employment;(d) and that, in the other, he has conferred on him all the powers usually possessed by persons engaged in the same business as himself. “If a person,” says Lord Ellenborough, “authorise another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority; and he may bind his principal within the limits of the authority with which he has been apparently clothed with respect to the subject matter.”(e) And so it was said in another case;—whatever the duty of an agent requires him to do in the business of his employers, must be presumed to be done with their knowledge and direction.(f)

From this then it appears, that a general agency is constituted, not by the authority which the agent actually receives from his principal, but by that which the latter allows the agent to assume. And indeed there would be no safety in mercantile transactions were it otherwise; for, as was well observed by the court in the case of *Nickson v. Brohan*, cited above, “a servant, by transacting affairs for his master, does thereby derive a general authority and credit from him: and if this general authority were liable to be determined for a time by any particular instructions and orders to which none but the master and servant are privy, there would be an end of all dealing but with the master.”

Accordingly, it will be for the jury to determine to what extent the principal has accredited his agent; and if they find that he has been enabled by the former to hold himself \*out to the world [ \*77 ] as possessing a certain authority, he will be bound by the exercise of that authority, whether the agent really possessed it or not. This will appear from the following case. A. employed B., his factor, to import goods from a foreign country. Upon the arrival of the goods, B., who resided in London, transmitted to A. who resided in the country, the invoice, but delivered the bill of lading to a warehouse-keeper, in order to get the goods entered and warehoused. In the warehouse-keeper's books they were described as the property of B. By the bill of lading the goods were to be delivered to the

(c) *Nickson v. Brohan*, 10 Mod. 109, 111; *Pickering v. Bush*, 15 East, 36, 45.

(d) *Townsend v. Inglis*, Holt, N. P. C. 278, (3 E. C. L. R.)

(e) *Pickering v. Bush*, *supra*, 43.

(f) *Ex parte Macleod*, 1 Rose, 447.

order of the shipper or his assigns, and it was indorsed by the shipper in blank. B. had not authority from A. to sell the goods; but after they had been standing in his name in the warehouse-keeper's books for nearly five months, B. sold them; and it was held that, although B. had no authority to sell, it should still, under the circumstances, have been left to the jury to say, whether A. had not, by his conduct, enabled B. to hold himself forth to the world as having, not the possession only, but the property, and as being therefore in a situation to convey a good title to a purchaser.(g)

It should, however, be borne in mind, that when it is sought to charge the principal on a contract entered into by his agent, on the ground that the latter has on previous occasions entered into similar contracts on behalf of his principal,—it must be distinctly shown that the principal knew, or had the means of knowing that fact.(h)

Let us now apply these principles to those classes of agents which form more immediately the subject of the present treatise. And first, as to factors.

[ \*78 ] It seems then to have been long the prevailing opinion, \*that factors, known to be such, are general agents within the meaning of the second of the above definitions; and that, therefore, all bargains which third parties make with them in the course of their business as factors, without notice of their private instructions, and without fraud or collusion, are binding on their principals.(i) Thus, it was held in the time of Queen Elizabeth, that if one be factor for a merchant to buy one kind of stuff, as tin, and the said factor hath not used to buy any other kind of wares, but this kind only for his master; now if the said factor buy silks or any other commodities for his master, and assumes to pay money for that, the master shall be charged in assumpsit for the money.(k) So it has been decided, that if a factor sell goods for a less price than his commission directs, such sale will nevertheless bind his principal.(l) And it appears to have been the opinion of Heath, J., that the same would be the case, if a factor employed to purchase were to exceed the sum at which his principal had instructed him to buy.(m) These decisions, moreover, and especially that of *Petties v. Soame*, seem to lead to the conclusion, that a factor's power to bind his principal in any particular case, is not to be measured merely by the mode in which that principal has previously employed him, but that it depends entirely on the circumstance of his being a factor. In that capacity he is supposed to possess a general power to buy and sell; and this power carries along with it certain incidents recognized by law, the existence of which all persons who deal with him in his capacity of factor are, unless they have notice to the contrary, at liberty to assume, and by the exercise of which [ \*79 ] his principal will be bound; and if this be so, then it follows as a general rule, that a known factor has power to

(g) *Dyer v. Pearson*, 3 B. & C. 38, (10 E. C. L. R.); see also the recent case of *Dodley v. Varley*, 4 Per. & Dav. 448.

(h) *Davidson v. Stanley*, 3 Scott, N. R. 42.  
(i) *Daniel v. Adams*, Ambler, 495. 498; *Petties v. Soame*, Goldborough's Rep. 138; *Bell's Com. on Merc. Jur.* 385; *Howard v. Braithwaite*, 1 Ves. & B. 302. 309; and they are so regarded by the law of Scotland, *Bell, Princip. of the Law of Scot.* § 219; and of America, *Story on Agency*, § 131.

(j) *Daniel v. Adams*, *supra*.

(k) *Petties v. Soame*, *supra*.

(m) *Hicks v. Hankin*, 4 Esp. 112.

bind his principal by all contracts made by him in the way of his business as a factor, whether he has ever been before employed by the same principal in that capacity or not; and that such power cannot be limited by any private order or direction with which the party dealing with the factor is not acquainted. Hence the necessity for the caution given in an old case on this subject:—"and for that, let the master take heed what factor he makes."

And not only will the principal be bound by contracts made by his factor in pursuance of instructions to that effect, but it seems that where the principal has been in the habit of employing a particular factor, he will be bound by contracts made by him on his behalf, although without instructions, or even after his agency has been determined; unless, that is, the persons who deal with the factor have notice of those circumstances. Accordingly, the court of the Queen's Bench, in a recent case, refused a rule for a new trial, on the ground that one H. had been trading in his own name as the defendant's agent, with the defendant's full knowledge and authority, and that till the defendant gave notice to the world that he had revoked H.'s power to act for him, all persons had a right to hold him to the contracts made by H.(a) And in like manner, where it appeared that the defendant had in several instances employed one A. B., as his agent, to purchase goods from the plaintiffs on credit, and it was shown that on the occasion in question he had ordered goods in the name of the defendant, and had likewise ordered them to be sent by the usual conveyance, but which goods, it was proved, had been ordered by A. B. without the defendant's authority, and had afterwards been intercepted by him and applied to his own use: it was held, that the defendant was nevertheless liable for the price of these \*goods, because he had, by the previous course of dealing, [ \*80 ] authorized the plaintiffs to treat A. B. as his agent.(o)

In like manner, the principal will be bound by the contract of his factor, even although it be not within the scope of the ordinary business of the latter, provided he have on former occasions recognized and adopted similar contracts entered into by him. This proceeds on the principle, that usual employment is evidence of a general authority;(p) and falls therefore within the rules already laid down respecting the power of a general agent to bind his principal. Although, therefore, it is no part of a factor's general authority to draw, indorse, or accept bills by procuration for his principal, yet there can be no doubt, that if on former occasions the factor has done

(a) *Trueman v. Loder*, 11 A. & El. 589, 592, (39 E. C. L. R.)

(o) *Todd v. Robinson*, R. & M. 217, (21 E. C. L. R.); see also *Gillman v. Robinson*, ib. 226, and 1 C. & P. 642, (11 E. C. L. R.) The law on this subject is thus stated by Domat: "The powers of factors and agents are determined by their revocation. But if after they are recalled they treat with persons who knew nothing of their being recalled, what they shall have transacted will oblige the principal, unless the revocation has been published, if it was the custom so to do, or unless by other circumstances, the person who treated with the factor might have known that he ought not to have treated with him." 1 Domat, B. 1, Tit. 16, § 3. In order to obviate the difficulties arising from the law on this subject, Mr. Chitty, in his *Treatise on Bills of Exchange*, suggests, that for the purpose of apprising all parties of the determination of the factor's authority, notice of that fact should be given by the principal in the Gazette, as well as to his correspondents individually—notice in the Gazette not being in general sufficient to affect a former customer, unless he has had express notice thereof. Chitty on Bills, 32.

(p) Per Lord Eldon; *Davison v. Robertson*, 3 Dow, 229.

either of these acts, and the principal has approved of them, he will be bound by the like acts of his factor in future, although done without his authority,—unless the party who seeks to charge him had notice of that fact.(q) But in these cases the holder of the bill must show, that he actually took it from the factor on the faith of a supposed authority in him, which faith was induced \*by the fact of his having known him to have previously engaged in similar transactions on behalf of his principal.(r)

But still it must be remembered, that the right of third parties to hold the principal bound by contracts into which they have entered with his factor, is liable to be very much limited by the conduct of such third parties themselves. Thus, if the seller of goods, knowing at the time of the sale that the buyer, although dealing with him in his own name, is in truth acting as factor for another, nevertheless elect to give credit to such factor, he cannot afterwards charge the principal for the price of the goods.(s) But if the principal be not known at the time of the sale, but be afterwards discovered, then the mere fact of the vendor having given the factor credit in the first instance, will not deprive him of his right to charge the principal when so discovered;(t) even although the principal should in the meantime have remitted money to the agent for the purpose of discharging the debt.(u) Nor will the vendor be deprived of this right, although he knew at the time of the sale that the vendee was acting as a factor, provided he did not know who his principal was.(x) But if, after the principal is discovered, the vendor allow the day of payment to go by, without calling on the principal, and in the meantime the latter has paid his factor the price of the goods, the vendor will be deprived of his right to charge the principal; because, by the conduct of the vendor the principal may have been led to suppose that he relied solely on the factor for payment.(y)

[ \*82 ] \*In the case of a foreign factor, it appears that, by the usage of trade, the credit is in all cases understood to be confined to him; but still this is a question for the jury.(z)

How far the rules above laid down, with reference to the power of a factor to bind his principal, are applicable to the case of a broker is, from the want of express decisions on the subject, somewhat difficult to determine. An opinion seems at one time to have been entertained, that the character of a broker was that of a special, rather than that of a general agent; and that therefore his power to bind his employer must depend on his actual authority. With reference to this however, Lord Ellenborough is reported to have said: "I cannot subscribe to the doctrine that a broker's engagements are necessarily and in all cases limited to his actual authority;"(a) and perhaps the more correct rule is,—that a common broker employed in the ordi-

(q) *Beaves, Lex Merc.* 86; *Barber v. Gingell*, 3 Esp. 60.

(r) See *Cash v. Taylor*, 8 Law Jour. 262. First series.

(s) *Paterson v. Gandesiqui*, 15 East, 62; *Addison v. Gandesiqui*, 4 Taunt. 573; see also *Exp. Hartop*, 19 Ves. 262.

(t) *Paterson v. Gandesiqui*, supra; *Thompson v. Davenport*, 9 B. & C. 78, (17 E. C. L. R.)

(u) *Nelson v. Powell*, 3 Doug. 410, (26 E. C. L. R.)

(x) *Thompson v. Davenport*, supra.

(y) *Kymer v. Suwercroft*, 1 Camp. 109.

(a) *Per Bayley, J., Paterson v. Gandesiqui*, supra.

(e) *Pickering v. Bush*, 15 East, 38. 43.

ary course of his trade, is so far a general agent, as to have power to bind his principal to third parties by contracts within the scope of that employment, whether the terms of such contracts be in accordance with his private instructions or not. Such certainly appears to be the doctrine laid down in the cases of *Pickering v. Busk*, and *Whitehead v. Tuckett*; (b) or at least, such doctrine would seem to be fairly deducible from them; for although in both those cases there was perhaps sufficient evidence to show, that in the particular transactions out of which they arose the agents had, (without reference to their characters as brokers,) been clothed by their principals with a general authority in respect of the subject matter; still it seemed to be the opinion of all the judges, and especially of Lord Ellenborough and Mr. Justice Bayley, (c) that the mere fact of the principal's having employed the brokers to dispose of property in the ordinary course of their business, was tantamount to giving them a "general [ \*83 ] authority, as to third parties, with reference to such property.

The only case which, it is believed, militates against this view of the subject, is the following. An action was brought to recover damages for the loss arising from the resale of a certain quantity of raw silk sold by the plaintiffs at one of their sales, to the defendant. The silk had been bought for the defendant by one B., a broker, and the defence set up by the defendant was;—that his orders to B. were to buy the best Bengal raw silk; whereas this was not raw-silk, nor of the best quality; and Lord Kenyon, before whom the cause was tried, after distinguishing between the power of a general and that of a special agent to bind his principal, is reported to have said:—that if in the present case the defendant could prove, that he had so specially authorized B. to bid for him for best Bengal silk, and this turned out to be not of that description, he should not be bound by a contract so made without his authority; but that B. should be liable to an action at the suit of the plaintiffs for the abuse of it. (d)

Now, it will be observed, that in the above report of this case it is not stated whether there was evidence of the following facts; first, whether B. was a known broker; or secondly, whether he had been in the habit of buying for the defendant at the Company's sales on former occasions. The decision proceeds on the general ground,—that the broker having been authorized to purchase a commodity of one particular kind only, his principal was not bound by the purchase of any other. It is submitted however, that as a general proposition, this cannot be maintained. If it was part of the broker's ordinary business to make contracts of purchase, and if for this purpose he was in the habit of attending at places where goods were exposed for sale, surely the parties to whom such goods belonged would, [ \*84 ] from this very circumstance, have a right to assume that he had come to the place of sale clothed with full power to bind his principal by contracting for the purchase of any goods which might be there exposed for sale; or if this be not admitted, is it then to be contended that the vendors would be obliged in every case to consult

(b) 15 East, 38. 400.

(c) 15 East, 43. 45. 411.

(d) *East India Company v. Henaley*, 1 Esp. 111.

the broker's mandate, in order to ascertain whether the authority thus apparently conferred on him was his real authority or not? Such appears to be the only conclusion to which the decision now under review would lead; but it is submitted that this conclusion is expressly negatived by the whole tenor of the cases cited above; and that it is likewise at variance with those general principles of policy, by which our courts are more or less influenced in the decision of all questions relating to mercantile transactions.

Indeed in a case which was afterwards decided by the same learned judge, he seems to have acted on the principle now contended for. The case was this. A broker in London had been employed by the master to advertize a ship as a general ship bound to Hamburg; and in the printed papers the broker had inserted a clause, purporting that the ship was to sail with convoy from the place of rendezvous. There was no evidence given either of the assent or dissent of the defendants (the owners) to this warranty, or of their knowledge of it. But there was contradictory evidence upon a question made at the trial, as to whether the master had forbidden the broker to insert this clause. Lord Kenyon however told the jury, that he thought that point quite immaterial; for, as the broker was authorize to advertize the ship, the owners were answerable to strangers for his acts, although he had exceeded his authority, and must seek their remedy against him. And accordingly the plaintiff had a verdict.(e)

[ \*85 ] This case appears to contain the only true principle by which to test the powers of a broker to bind his employer to third parties; and if this be so, then it is submitted that the proposition stated above is fully borne out. A glance at the case itself will show this. The broker was authorized to advertize a ship—he had no instructions to insert in the advertisement any warranty as to sailing with convoy, but nevertheless he did so; and his employer was held bound. Why? Because the broker, by inserting this clause, was not going beyond the scope of his usual employment. It was perfectly consistent with his business as a broker to insert the warranty in question; and therefore, although by so doing he went beyond his instructions, still, third parties who had no notice of these instructions were considered to be entitled to hold the principal to the warranty so made.

But if the vendors of goods, prior to a sale taking place, issue and circulate catalogues of the goods to be sold, in which catalogues are likewise contained the conditions of sale; it may be doubted whether a principal, to whom one of these catalogues is sent by his broker, and who authorizes his broker to purchase on the terms therein specified would be bound by a contract entered into by his broker at such sale on any other than those terms, even although the vendors did not know that the party buying was merely a broker. This point arose in the case of *Horsfall v. Fauntleroy*,(f) but was not expressly decided. Mr. Justice Parke however, in delivering judgment in that case, expressed himself to be very strongly of opinion that, under the cir-

(e) *Rinquist v. Ditchell*, cited *Abbott on Ship*, 113, 6th edition. This case was decided in *Michan*, 40 Geo. 3; that of the *East India Company v. Hensley*, in *Hil*. 34 Geo. 3.

(f) 10 B. & C. 755, (31 E. C. L. R.)

circumstances mentioned, the principal could not be presumed to have authorized his broker to enter into a contract, on any other terms than those contained in the conditions of sale communicated to him. At all events it appears, that if the conditions of sale were such as to lead the principal to conclude, that he would be safe in paying his broker the price of the goods purchased, the vendor would not be at liberty, in the event of the broker becoming bankrupt without having paid him, to turn round and charge the principal. [ \*86 ] (g)

In the cases which we have considered hitherto, the contracts of the broker, if they bind the principal at all, will bind him absolutely; but there are some cases in which the principal is only conditionally bound by such contracts. Thus by the custom of London, where goods are sold by a broker to be paid for by bill, the principal has a right to annul the contract within a reasonable time, provided he is dissatisfied with the sufficiency of the purchaser. But the intimation of his dissent must be made so soon as he has had an opportunity of making inquiry; and five days have been considered too long a time for that purpose. (h) And in like manner, it has been recently decided by the Court of Exchequer, that even in cases in which it is usual for third parties to credit the broker in the first instance whether the principal be named or not, (as is the custom on the Stock Exchange,) it is still open for the jury to say whether credit was actually given to the broker or to his principal, and that if they find the latter, the principal will, notwithstanding the usage, be bound. (i)

As has been already hinted however, these rules will not apply to any case in which the person who deals with a factor or broker has notice of the extent of his actual authority,—because in these cases the authority itself becomes, as between the principal and the person with whom the agent deals, as much the measure of the agent's power as if the question was between him and his principal only; and accordingly, if, in such a case, the agent go beyond his authority, the principal will not be bound. (j)

\*So it appears, that even where the person with whom a known factor or broker deals has no notice of the extent of his actual authority, the principal will, notwithstanding, be at liberty to repudiate any contract entered into by him, which is beyond the scope of the general authority of that class of agents, unless, that is, he has enabled the factor or broker to deceive third parties, by furnishing him with the means of concealing his representative capacity. (k) The reason of this appears to be, that persons engaged in mercantile transactions must be presumed to know what contracts are within the limits of the general authority of a factor or broker; and

(g) *Per Tenterden, C. J., Horsfall v. Fauntleroy, supra.*

(h) *Hodgson v. Davies*, 2 Camp. 533.

(i) *Mortimer v. McCallan*, 6 M. & W. 58. (\*)

(j) *Howard v. Braithwaite*, 1 Ves. & B. 202; *Jackson v. Clarke*, 1 Y. & Jer. 216. (\*)

(k) *Newsom v. Thornton*, 6 East, 17; *De Leira v. Edwards*, cited 1 M. & Sel. 147; *Boyson v. Coles*, 6 M. & Sel. 14, 25; *Baring v. Corrie*, 2 B. & Al. 137, 144; *Guerreiro v. Peile*, 3 B. & Al. 616, (5 E. C. L. R.); *Barton v. Williams*, 5 B. & Al. 395, 403, (7 E. C. L. R.); *De Bouchout v. Goldsmid*, 5 Ves. Jr. 211, 213.



that therefore, before entering into a contract which is not of this character, they are bound to inquire into the real authority of the person with whom they are about to contract. Thus, whilst on the one hand the law protects persons dealing with this class of agents, by binding their principals by all contracts entered into with them in the ordinary course of their business, so on the other, the principal is protected wherever the contract is not of this character. The agent in this latter case has not been clothed with an apparent authority—for that, as we have seen, can be presumed to extend only to acts within the scope of his usual employment; and accordingly, when he goes beyond this, it becomes the duty of third persons to inquire into his real authority, nor can they neglect to do so except at their own peril. "It would be well, says Lord Ellenborough, "if traders, when they deal with brokers as if they were merchants, would make themselves secure by first inquiring whether they will be borne out in dealing with them in that character; it would save a vast deal of risk and [ \*88 ] litigation."(l) At the same time, if the principal \*enables his factor or broker so to deal with property as to conceal his representative capacity, and thereby to mislead third parties, there can be no doubt that he will be bound by such dealings, even although the agent may, by engaging in them, have exceeded his general authority.(m)

Having thus treated of the powers of factors and brokers to bind their principals by contracts, let us now consider the powers which they possess to bind their principals by acts done in connection with those contracts.

The rule on this subject has been thus stated. "An agent may undoubtedly, within the scope of his authority, bind his principal by his agreement, and in many cases by his acts. What the agent has said, may be what constitutes the agreement of the principal, or the representations or statements made may be the foundation of, or the inducement to the agreement. Therefore if writing is not necessary by law, evidence must be admitted to prove the agent did make that statement or representation."(n) In like manner it was said by another learned judge:—"When it is proved that A. is the agent of B., whatever A. does, or says, or writes, in the making of a contract as the agent of B., is admissible in evidence, because it is part of the contract which he makes for B., and therefore binds B."(o); and it has been well observed, that it is quite consistent with the rules of evidence that proof of the representation or statement of the agent in such cases should be admitted, because such representation or statement is [ \*89 ] in the nature of original evidence, and not of hearsay, it being indeed the \*ultimate fact to be proved, and not a mere admission of some other fact.(p)

"The reason of this rule," said the late Mr. Justice Park, "is no-

(l) *Graham v. Dyster*, 6 M. & Sel. 1. 4; see also the observations of Lawrence, J., in *Newson v. Thornton*, *supra*; and the recent case of *Hawthorne v. Bourne*, 7 M. & W. 597,(\*) where the same principle is illustrated.

(m) *Boyson v. Coles*, 6 M. & Sel. 14.

(n) *Sir W. Grant, M. R., Fairlie v. Hastings*, 10 Ves. Jr. 122. 126.

(o) *Per Gibbs, J., Langhorn v. Alloutt*, 4 Taunt. 511. 519.

(p) 1 Phil. on Ev. 402; *Greenleaf on Ev.* 128.

thing more than that which the law of England has for general convenience adopted, in treating of the relation between master and servant; declaring that the master must always be responsible for the act of his servant, if done by his express or implied command. It would indeed be of very mischievous consequence, if a man might shelter himself from responsibility of any kind, by throwing the blame upon his agent:—it would be to allow him to contradict a maxim of law which says, that no man shall be suffered to make any advantage of his own wrong; and would overturn that wise principle of equity, —that when one of two innocent persons (for the master may, without danger to the argument, be supposed innocent,) must suffer for the fraud or negligence of a third, he who gave credit to that third person shall bear the consequences arising from the confidence so reposed.”(g)

In order however to bind the principal, the act of the agent must be done by his express or implied command; and the above rule must therefore be taken subject to the following qualifications. *First*; it is clear that the act of an agent will not bind his principal, unless such act be within the scope of his general authority;(r)—in the case of a factor or broker therefore it follows, that if the contract in connexion with which the act in question is done, be beyond the scope of his general authority, and therefore not binding on his principal, the latter will not be bound by the act itself;—and *secondly*, it is necessary that the act in respect \*of which the principal is sought to be charged, should have been done at the time of making [ \*90 ] the contracts,(s) or, in the words of Sir W. Grant, it must appear that it was the foundation of, or inducement to the contract. Unless this be the case, the act in question cannot be considered to form part of the *res gestæ*, and therefore, will not bind the principal.

These qualifications will in all cases be insisted on; and it appears to be necessary for the protection of the principal that they should, because,—although, for some purposes, a person who deals with an agent is considered to be dealing with his principal, and has therefore a right to hold the latter bound by the representations and statements of the former,—still, the representation of the agent cannot be regarded as that of the principal, if it be made with reference to a contract into which the former has entered without any authority either real or apparent from the latter, inasmuch as, beyond these limits the agent does not represent his principal at all; and for a like reason, the representation of the agent cannot be regarded as that of the principal, where it is not made until after the contract with reference to which it is made has been completed,—because, with the completion of the contract, the agent's authority, *quoad* that contract, is determined. It is evident then, that in such cases the principal gives no warrant to third parties to regard representations made by his agent, as having been made by himself; and justice therefore does not require that he should be bound by them.

(g) 1 Park on Mar. Insur. 446, 8th edit.

(r) Per Ashurst, J., *Bauman v. Radenius*, 7 T. R. 663, and see *Drake v. Marryat*, 1 B. & C. 473, (8 E. C. L. R.); *Snowball v. Goodricks*, 4 B. & Ad. 541, (24 E. C. L. R.); *Garth v. Howard*, 8 Bing. 451, (21 E. C. L. R.)

(s) *Dawson v. Atty*, 7 East, 367; *Helyear v. Hawke*, 5 Esp. 72.

Subject to the above observations, the following may be regarded as the result of the cases on this subject.

[ \*91 ] First, the principal will be bound by the representation of \*his factor or broker, made with reference to any contract entered into by the latter on his behalf,(t) unless there be evidence of such representation having been altered or withdrawn, previous to the completion of the contract.(u)

So the declaration or admission of the factor or broker, made under like circumstances, will bind his principal;(x) but whether evidence of a mere acknowledgment by a factor employed to buy goods, that he had received such goods, would be evidence of their having been delivered to his principal, so as to bind him, is very doubtful. It is true that in the marginal note to the case of *Biggs v. Lawrence*,(y) the law is so stated. But on reference to the text of that decision it will be found, that the agent, the effect of whose acknowledgment was then in dispute, was an agent employed not to buy, but only to receive goods which were to be procured by another; and the report states that Mr. Justice Buller,—who tried the cause—held at *Nisi Prius*, that an acknowledgment under the hand of such an agent would be evidence against his principal, as much as if it had been in the handwriting of the principal himself. If this be law, then it would seem to follow,—not that, where a factor is employed to purchase goods, his acknowledgment of having received them will be evidence of a delivery to the principal,—but, that if goods were sent to a factor by a third person, for sale on his principal's account, his acknowledgment of having received them would be attended with this effect. But whether this be law or no admits of much question. The point involved in the above dictum of Mr. Justice Buller was not, let it be observed, the principal point in the case; nor does it appear to have

[ \*92 ] entered into \*the consideration of the court, in coming to their ultimate decision with reference thereto. Moreover a doubt was expressed as to the correctness of that dictum in the subsequent case of *Bauerman v. Radenius*;(z) and it was even stated by counsel in the course of the argument in that case, that Lord Kenyon had frequently ruled the contrary at sittings since the time of *Biggs v. Lawrence*, without the correctness of such ruling ever having been questioned; but, as neither that learned judge (who was present during the argument in the case of *Bauerman v. Radenius*), nor his learned brethren on the bench, expressed any opinion as to the correctness or incorrectness of the disputed dictum, and as it is believed that there is no case since that time in which the precise point has arisen, it must still be regarded as a *veraxata quæstio*. It has indeed been decided that a letter from an agent abroad stating the receipt of money, coupled with the answer of the principal directing the disposition of the money, is evidence of the receipt of such money by the latter.(a) But this case, it will at once be seen, does not depend upon the bare admission

(t) *Moens v. Heyworth*, 10 M. & W. 147; (\*) *Helyear v. Hawke*, 5 Esp. 71; *Alexander v. Gibson*, 2 Camp. 555; *Rinquist v. Ditchell*, cited *Abbott on Ship*, 113, sixth edition.

(u) *Edwards v. Footner*, 1 Camp. 530.

(x) *Peto v. Hague*, 5 Esp. 133.

(y) 7 T. R. 663.

(z) *Coates v. Bainbridge*, 5 Bing. 58, (15 E. C. L. R.)

(y) 3 T. R. 454.

of the agent, and therefore does not strengthen the position said to have been laid down in *Biggs v. Lawrence*.

Again, previous to the passing of the statute 9 Geo. 4, c. 14, it was held, that the admission of any servant or agent intrusted by the principal to transact his business for him, would have had the effect of taking a debt out of the statute of limitations.(b) But this is no longer the case, it being now decided, that the written acknowledgment required for that purpose by the said statute of the 9 Geo. 4, c. 14, must bear the actual signature of the party to be charged thereby; and that the signature of an agent will not suffice.(c) Such an admission therefore by a factor or broker will not bind [ \*93 ] his principal.

And, as the declaration or admission of the factor or broker will bind his principal, so the latter will be bound by the misrepresentation or concealment by the former of any material fact connected with the subject of his agency, whether such misrepresentation or concealment happen through the fraud of the agent, or merely through his negligence. Thus in the case of *Shirley v. Wilkinson*,(d) it was held by Lord Mansfield and the rest of the court, that if a broker at the time when he effects a policy does not, in representing to the underwriter the state of the ship and the last intelligence concerning her, disclose the whole, and what he conceals shall appear to the jury to be material, they ought to find for the underwriter; because in such a case the contract is void, although the concealment may have been innocent, the facts not communicated having appeared immaterial to the broker, and having been concealed merely on that account. But where a broker, in pursuance of instructions previously received, effected a policy at Lloyd's, and at that time there was a letter lying unopened on his table at the coal-exchange, which letter announced the ship's loss; it was held that the jury were warranted in finding, that this was not such negligence on his part as to avoid the policy.(e) And it has likewise been held; that if an insurance-broker, at the time he effects a policy, state merely by way of inference and computation, that the ship on which the policy is effected is at a certain place, and it turn out that he was wholly mistaken, this will not avoid the policy; —the underwriter not having taken the pains to inquire what were the facts on which the broker formed his conclusion.(f) But where a factor—employed by an agent of the plaintiff to \*purchase [ \*94 ] a cargo of oats, which were to be consigned to one F., on the plaintiff's account—purchased and shipped the oats accordingly, and advised the plaintiff that he had so done; whereupon the plaintiff caused an insurance to be effected on the said cargo; but it appeared that before the factor's letter was despatched, he knew that the ship had been lost; it was held that the plaintiff could not recover, "because it must be taken for granted that the principal knows whatever the agent knows; and if he build his information on that of his agent, and his agent be guilty of misrepresentation, the principal must suffer."(g)

(b) *Palethorpe v. Furnish*, 2 Esp. 511.

(c) *Hyde v. Johnson*, 3 Scott, 289, (36 E. C. L. R.)

(d) 1 Doug. 306, note 81.

(e) *Wake v. Atty*, 4 Taunt. 493.

(f) *Brine v. Featherstone*, 4 Taunt. 869.

(g) *Fitzherbert v. Mather*, 1 T. R. 12. 16.

In like manner, if a cargo of goods be consigned to a factor, with instructions to effect insurance thereon, and he conceal any material fact, the underwriters will be discharged; (*h*) or if a factor sell goods of one kind or quality, and represent them to be of another, the merchant will be liable for the consequences of this fraudulent sale, although there has been no fraud on his part. (*i*) In all these cases the principal is held liable on the ground already mentioned, namely, that where one of two innocent persons must suffer by the fraud or negligence of a third, the loss should fall on him by whom the latter was accredited, rather than on a stranger. (*k*)

[ \*95 ] \*Under this branch of our subject, it now remains for us only to state, what acts of third parties dealing with factors or brokers will bind their principals.

First then; it is clear that notice to a factor or broker, of any fact or circumstance connected with a transaction in which he is engaged for his employer, will bind the latter; and it appears that the principal will be equally bound by notice given to his agent, whether such notice be actual or merely constructive. (*l*) These rules follow naturally from the maxim,—that it must be presumed the principal knows whatever the agent knows; (*m*) and they are consistent with the soundest principles of policy; for, as has been well observed, were it otherwise, the neglect of the agent, whether intentional or not, might operate very prejudicially on the rights of third parties.

In order however to the principal's being affected by notice to his agent, it must appear that the latter had such notice while he was in fact concerned for the principal,—and indeed in the course of the very transaction respecting which the notice was given; (*n*) and in like manner, as the knowledge of the agent is the knowledge of the principal only so far as the agency extends, it follows, that the principal will not be affected by notice to his agent in any matter which is not within the authority of the latter. Where therefore, to an action brought for improperly loading a cargo of timber, whereby it was lost,

[ \*96 ] the answer was, that it had been so \*loaded with the assent of the plaintiff; but the only evidence in support of this was, that the plaintiff's agent knew of the manner in which it had been loaded without having made any objection thereto; it was held, that the knowledge and assent of the plaintiff could not be inferred

(*k*) *Willos v. Glover*, 1 Bos. & Pul. N. R. 14; and see *Da Costa v. Scanderet*, 2 P. Wms. 170; *Seaman v. Fonnereau*, 2 Str. 1183; *Hodgson v. Richardson*, 1 Bl. 463.

(*l*) *Hern v. Nichols*, 1 Salk. 289; Com. Dig. Action on the Case for Deceit, B.

(*k*) Per *Baile*, J., *Fitzherbert v. Mather*, *supra*; and see per *Holt*, C. J., *Hern v. Nichols*, *supra*; 1 Park on Mar. Insur. 446, 8th edition; and per *Denman*, C. J., in the recent case of *Taylor v. Green*, 8 C. & P. 316, (34 E. C. L. R.) As to what will be sufficient evidence of fraud, so as to avoid a contract as against the principal, on account of a representation made by the agent, see *Cornfoot v. Fowke*, 6 M. & W. 358, (\*) and *Moens v. Heyworth*, 10 M. & W. 147, (\*) in which latter case it was held by the Court of Exchequer, Abinger, C. B., dissentients, that a collateral statement, made at the time of entering into a contract, but not embodied in it, must, in order to invalidate the contract on the ground of its being a fraudulent statement, be shown not only to have been false, but to have been known to be so by the party making it, and that the other party was thereby induced to enter into the contract.

(*l*) *Hiern v. Mill*, 13 Ves. 120; *Chandos v. Brownlow*, 2 Ridgw. P. C. 394.

(*m*) Per *Ashurst*, J., *Fitzherbert v. Mather*, *supra*; and per *Littledale*, J., *Berkley v. Watling*, 7 A. & El. 29. 38, (34 E. C. L. R.)

(*n*) *Hiern v. Mill*, *supra*; *Mountford v. Scott*, 3 Madd. 34; 1 M. & R. 66, (17 E. C. L. R.)

from that fact, as it was not shown that the agent had any authority to interfere with the loading of the timber in question.(o)

It has likewise been long recognized as a rule in our law, that a payment made to a factor in the course of his employment will bind his principal, unless the latter have given the debtor express notice not to pay the factor. "The purchaser of goods from a factor," says Lord Mansfield, "has a right to pay him the money and be discharged; yet when the principal and factor have a dispute, the buyer, with notice of such dispute, has no right to prejudice the title of the principal."(p) In like manner it was said by Mr. Justice Buller,—"a factor's sale does by the general rule of law create a contract between the owner and buyer; and therefore, if a factor sell for payment at a future day, and the owner give notice to the buyer to pay him and not the factor, the buyer would not be justified in afterwards paying the factor;"(q) and this rule has now been made the subject of legislative provision; for, by the statute 6 Geo. 4, c. 94, s. 4, it is enacted:—that it shall be lawful for any person to contract with any agent intrusted with goods, or to whom the same may be consigned, for the purchase of any such goods, and to pay for the same to such agent; and that such payment shall be binding upon the owner of such goods, notwithstanding such person shall have notice that the person entering into such contract is an agent: provided such payment be made in the usual and ordinary course of business, and that such person shall not, when such contract is entered into or payment made, [ \*97 ] have notice that such agent is not authorized to sell the said goods, or receive the said purchase-money.

It should however be borne in mind, that the mere absence of notice that the agent intrusted with the goods is not authorized to sell, will not protect a purchaser under this statute, unless it appear that the agent's ordinary business was that of a factor. And therefore, where a wharfinger, who was also in the habit of doing business as a flour factor, received flour merely in his capacity of wharfinger, and without any authority to sell the same; and the defendant, having no notice of the wharfinger's want of authority, purchased the flour in question from him, and paid him the price, with which he afterwards absconded;—it was held, that the owner of the flour might maintain trover against the purchaser, notwithstanding the statute.(r)

Again, it is presumed that payment to a factor would bind the principal, even after the revocation of the factor's authority, provided the party paying had no notice of such revocation.(s) But it appears that in the event of the factor becoming bankrupt, it would be otherwise; for that event, of itself, operates as a revocation of his authority to receive any money on account of his principal.(t)

Nor will payment to a factor, before the time of credit has expired,

(o) Gould v. Oliver, 2 Scott, N. R. 241. 263.

(p) Drinkwater v. Goodwin, Cowper, 251. 255.

(q) Buller's N. P. 130, and see Mann v. Forester, 4 Camp. 60.

(r) Monk v. Whittenbury, 2 B. & Ad. 484, (23 E. C. L. R.)

(s) See Monk v. Clayton, Molloy, 270. The law of Scotland is expressly to this effect. Erskine's words are:—"payment to one who had formerly been factor to the creditor, before the revocation of the factory was intimated to the debtor, extinguishes the obligation effectually." Inst. B. 3, Tit. 4, § 3.

(t) Per Holroyd, J., Hudson v. Granger, 5 B. & Al. 27. 33, (7 E. C. L. R.)

bind his principal, unless there be a custom to that effect in the particular trade, from the prevalence of which both parties must be supposed to have known that they were dealing on the terms of such custom; or unless \*the principal has allowed the factor to [ \*98 ] deal with the goods as his own.(u)

An opinion was at one time entertained, that where a factor acted under a *del credere* commission, the buyer would be safe in paying him the price of goods sold by him on account of his principal, even after notice by the latter not to pay the factor.(x) But this doctrine was founded on an erroneous opinion of the nature of the commission *del credere*, and it is now quite exploded. The mistake arose thus. It was considered that the commission *del credere* was an absolute engagement from the factor to the principal, to pay for the goods sold, and that it made him liable to his principal in the first instance;(y) and hence it was argued, that if the factor were not warranted, under such circumstances, to receive the price from the vendee, it would be a great hardship on him; because he would still be liable to his principal under his *del credere* commission, and yet not have the means of getting the money into his own hands by calling on the vendee.(z) This point however was afterwards more fully looked into, and the court ultimately expressed their opinion to be, that the commission *del credere* was nothing more than the premium or price given by the principal to the factor for his *guarantee*; that it presupposed a guarantee; and that therefore the effect of it was merely to render the factor answerable for the solvency of the vendee, so that on the failure of the latter the factor should stand in his place, and make his default good.(a) From this view of the case it became evident, that the object of the principal in giving a *del* [ \*99 ] *credere* commission was to obtain an additional \*security—that namely of the factor; and it was said, that it would be extremely hard, if, instead of having an additional security, he should find that he had only substituted one for another, that, in fact, he had merely shifted the responsibility from the buyer to the factor. But such it was considered, was not the effect of the commission *del credere*, a sale effected by a factor, it was said, must always be taken to create a contract between the owner and the buyer, whether the factor acted under a *del credere* commission or not; the owner therefore had, in this, as in other cases, a right to look for payment to the buyer, and might at any time before the factor was paid, step in and require payment to himself; and hence it was concluded, that although, before the principal interfered, the vendee would, by paying the factor in due course and according to the contract, be protected,—still, if he paid him after the principal had interfered, he paid entirely on the credit of the factor, and that therefore, if

(u) *Heisch v. Carrington*, 5 C. & P. 471, (24 E. C. L. R.); 11 Ad. & El. 555, (39 E. C. L. R.)

(x) *Scrimshire v. Alderton*, Str. 1182; per *Chambre, J.*, *Houghton v. Matthews*, 3 Bos. & Pul. 489.

(y) Per Lord Mansfield, *C. J.*, *Grove v. Dubois*, 1 T. R. 112, 115.

(z) Per Bayley, *J.*, *Morris v. Cleasby*, 1 M. & Sel. 576, 582.

(a) *Morris v. Cleasby*, 4 M. & Sel. 566, 574.

the latter made default, the purchaser would still be liable to the principal.(b)

It is however, well settled, that when the principal is indebted to his factor on the general balance of accounts, a payment to the latter will bind the principal, even after notice. "There is no case in law or in equity," says Lord Mansfield, "where a factor, having money due to him to the amount of the debt in dispute, was ever prevented from taking money for goods in his hands;"(c) and this doctrine is founded on the principle, that a factor has a lien on the price of goods in the hands of the buyer; and that for this reason, although he have not the possession of the goods, still, as he has the power of giving a discharge or bringing an action for the price, he has a right to retain the money in consequence of his lien, just as the mortgagee [ \*100 ] of an estate has, when the title deeds remain in his hands, although he is not in actual possession.(d)

In conformity with this principle it has been held, that, even after the bankruptcy of the factor, a payment to his assignees will bind the principal, if the balance of account be against the latter. This point was decided in the following case. The owner of goods being indebted to a factor, in an amount exceeding their value, consigned them to him for sale; and the factor, being similarly indebted to J. S., sold the goods to him. The factor afterwards became bankrupt; and on a settlement of accounts between J. S. and the assignee, J. S. allowed credit to them for the price of the goods, and proved for the residue of his claim against the estate; and it was held, that as the factor had a lien on the whole price of the goods, such settlement of accounts between the vendee and the assignees, afforded a good answer to an action by the original owner against the vendee for the price of the goods. "The factor," said Mr. Justice Best, "having a lien on the goods, and on the proceeds when received, had a right to require that the money should be paid to him, and not to his principal; and he had also a right even to retain the money against his principal. The payment to the factor, or to his assignees, who stand in his place, was therefore a valid payment as against the principal, and this is a good answer to the present action."(e)

And not only will the principal be bound by actual payment to his factor; but if the latter sell goods as his own, and the buyer knows nothing of any principal, the buyer may set off any demand he may have on the factor, against the demand for such goods, made by the principal."(f) The \*reason of this is, that when a contract, not under seal, is made with an agent in his own [ \*101. ] name for an undisclosed principal, either the agent or the principal may sue upon it; and it is therefore just that the defendant should, in the event of the principal suing on such contract, be placed in the

(b) *Hornby v. Lacy*, 6 M. & Sel. 166. 172.

(c) *Drinkwater v. Goodwin*, Cowp. 251. 256.

(d) See per Lord Mansfield, *Drinkwater v. Goodwin*, *supra*.

(e) *Hudson v. Granger*, 5 B. & Al. 27. 34, (7 E. C. L. R.); and see also *Scott v. Surman*, Willes, 400; and *Garratt v. Cullum*, ib. 405.

(f) *George v. Claggett*, 7 T. R. 359; *Rabone v. Williams*, *Stracy v. Decy*, *Ibid.* notes c, and c.; *Carr v. Hincheliff*, 4 B. & C. 547, (10 E. C. L. R.); *Purchell v. Salter*, 1 A. & El. N. S. 197, (41 E. C. L. R.); and see 6 Geo. 4, c. 94, s. 6.



same situation as if the agent had actually been the contracting party, and had brought the action in his own name.(g)

It does not even appear to be necessary, in order to entitle the buyer to this right, that the debt sought to be set off should have been contracted by the factor, before the principal was disclosed. This point was decided in the following case. A factor was employed to sell a cargo of goods consigned to him, and on the 6th of February sold to A. one parcel of the goods, and deliver to him an invoice in his own name. On the 13th of the same month A. applied to purchase another parcel; but some difference occurring as to the price, the factor said he must write to his principals. He did so, and afterwards informed A. of his answer. A. bought the goods at the price named by the principals; and on the 20th the factor delivered to him an invoice and bought-note in the names of his principals. On the same day the factor applied to A. to accept a bill, (not expressly on account of these goods.) He did so, and also made other advances to the factor, which covered the price of the first parcel sold on the 6th of February, except a sum which was paid into court. It was proved that the factor sometimes sold goods on his own account to pay himself advances; and that sometimes he sold as a factor; that in the former case it was his practice to deliver invoices in his own name; and in the latter to deliver also bought-notes. The question between [ \*102 ] the parties was; whether A. was entitled, as against the \*principals, to deduct the sum paid by him to the factor on the bill of exchange, as well as the other moneys advanced to him; and the learned judge told the jury, that the bill could not be considered as payment for the goods; but that if they were of opinion that the factor sold the goods on his own account, and that A. *bonâ fide* believed he had authority to do so, then the principals were bound by all the equities which existed against the factor, and consequently must allow A. to set off the amount of his advances to them, against the price of the goods. The jury thereupon found, that they believed the factor had communicated to A. that he sold the goods for other persons as principals, but that A., on the 6th of February, and until the 20th, *bonâ fide* believed that he was purchasing from the factor, and that he sold to pay himself advances; and that using the ordinary precaution of merchants, he was not bound to make any further inquiry on the 20th, when he accepted the bill. The verdict was thereupon entered for the defendant (A.) and the court, on motion made to enter it for the plaintiffs (the principals,) after taking time to consider, refused a rule.(h)

It was likewise held by Chief Justice Gibbs,(i) that if a factor be instructed to sell the goods, and, having authority so to do, he employ a third party to effect such sale, in whose hands he places the goods for this purpose, without disclosing his principal,—such third party, if previously under advances to the factor, would be entitled to set off the amount of those advances, against the claim of the principal for the proceeds of the goods; and that,—such advances being a just

(g) See *Sims v. Bond*, 5 B. & Ad. 389, 393, (27 E. C. L. R.)

(h) *Warner v. M'Kay*, 1 M. & W. 591.(\*)

(i) *Whittenbury v. Forrester*, cited 6 M. & Sel. 7, note.

debt between the factor and the person employed by him,—the circumstance of the latter giving the factor credit in account for the moneys received on the sale of the goods, would, as between them, be a good payment; so that the \*principal, not having [ \*103 ] been known at the time the transaction took place, would be bound thereby.

And now by the statute 6 Geo. 4, c. 94, s. 1, the principle of these cases is extended so far, as to give the consignee of goods, where the real owner is undisclosed, a lien on those goods for the amount of the factor's debt to him. For by that section it is enacted;—that any person intrusted for the purpose of consignment or sale with any goods, and who shall have shipped such goods in his own name, or in whose name any goods shall have been shipped by any other person, shall be taken to be the true owner thereof, so far as to entitle the consignee thereof to a lien thereon in respect to any money or negotiable security advanced by such consignee for the use of the person in whose name the goods shall be shipped, or received by such person to the use of such consignee, in like manner as if such person was the true owner of the goods, provided the consignee had not notice by the bill of lading or otherwise, that such person was not the actual and *bonâ fide* owner thereof. And by the same section it is enacted, that such person shall be taken, for the purposes of the act, to have been intrusted with the goods for the purpose of consignment or sale, unless the contrary be made to appear.(k)

But if, before the goods are all delivered, and before any part of them is paid for, the purchaser is informed that they belong to a third person, he will not be allowed, in an action brought by the principal to recover the price of such goods, to set off a debt due to him from the factor.(l)

We have already seen that a broker has, in general, no [ \*104 ] \*authority to sell in his own name, and therefore no authority to receive payment for goods sold by him. If, however, the broker sells goods for an undisclosed principal, a payment made to him in the usual course of trade, on account of such goods, will bind his principal.(m) Indeed it has been said that a broker, acting for an undisclosed principal, may even vary the terms of payment after the sale is completed, and that although the principal may interfere at any time before payment, yet he cannot rescind what has before been done by his broker,—because, where the person employed to sell, himself acts as principal, the real principal knowing this, must be taken to have authorized his mode of dealing and all its consequences.(n) If therefore it appear, that the owner of goods has allowed the broker through whom he sold them, to sell them as a principal, the purchaser of goods so sold will be discharged, by payment to the broker in any way which would have been sufficient had he been the real owner.(o)

(k) For the above statute, see Appendix.

(l) Moore v. Clementson, 2 Camp. 22. The same rules as to the right of a purchaser to set off, against the principal, a debt due from his factor, are adopted by the law of Scotland. Ersk. Inst. B. 3, Tit. 4, § 13, note, 1, Macallan's edition, 1838.

(m) Favenc v. Bennett, 11 East, 36.

(n) Per Lord Ellenborough, Coates v. Lewis, 1 Camp. 444; Blackburn v. Scholes, 2 Camp. 341. 343.

(o) Coates v. Lewis, *supra*.

There can however be no question, that the rule laid down in the above decisions will apply to those cases only in which the broker actually appears as principal; and that if the party with whom the broker deals, knows that in the particular transaction he acts as broker merely, a payment to him, otherwise than on the terms of the contract, will not bind his employer. What then will be considered sufficient notice of the character in which the broker acts? On this point there seems to be some doubt.

Thus in the case of *Coates v. Lewis*,<sup>(p)</sup> it was suggested, that the defendants must have known that the broker was not acting on his own account, because they knew him to be a sworn broker of the city of London. But Lord Ellenborough said, that a breach of the broker's duties in that respect could not affect the rights of third parties; and consequently he overruled the objection. So, in the case of *Blackburn v. Scholes*,<sup>(s)</sup> it was objected on the part of the plaintiff,—that the defendant must have known that the person from whom he bought was acting only in the capacity of broker, because he was described in the catalogues of sale as a sworn broker. But it is stated—in the marginal note to that case,—to have been held, that the circumstance of a person selling goods being so described in the catalogue of sale, was not sufficient notice to a purchaser that he was only an agent, so as to prevent such purchaser from dealing with him as principal.

It is submitted however, that the authority of both these cases, with reference to this point, is much shaken by that of *Baring v. Corrie*,<sup>(t)</sup> and that, in all probability, it would now be held, that such notice of the character of the seller would be sufficient to render it incumbent on the buyer, at least, to inquire into the authority of the former to receive payment on behalf of his principal; so that if payment were made without such inquiry, it would not bind him. Indeed it would seem, that subsequently to the decision of the above cases of *Coates v. Lewis* and *Blackburn v. Scholes*, Lord Ellenborough himself entertained this opinion. This may be inferred from the following case. An action was brought by the assignees of a bankrupt to recover the price of a quantity of skins which had been sold by the bankrupt to the defendant. It appeared that the contract was concluded through the intervention of T. & Co., who had acted as brokers for both parties, and that the terms fixed for payment were,—bill at four months, two-and-a-half discount for ready money, prompt 14 days. It further appeared that the defendants knew that T. & Co. were brokers, but that they did not know for whom they were concerned in the sale in question; and it was proved, that after the bargain was completed they paid T. & Co. for the skins, not according to the terms originally agreed upon, but by bill at two months, deducting one-and-a-half discount. There was, however, no evidence that T. & Co. had been authorized by their employer to accept payment in this way, and accordingly Lord Ellenborough decided;—that as the payment made to the brokers was not a payment under the terms of the contract, it was not available as a defence to the claim of the principal.<sup>(u)</sup>

<sup>(p)</sup> *Supra.*

<sup>(s)</sup> *Supra.*

<sup>(t)</sup> *Campbell v. Hassell*, 1 Starkie, 233, (2 E. C. L. R.)

<sup>(u)</sup> 2 B. & AL 137.

But even where the principal is known, a payment to his broker, although out of the usual course, will bind him, provided the broker have on former occasions received payments in a similar way with the sanction of his principal. This doctrine is established by the following decision. A., as the broker of B. & Co., sold goods to C., and drew a bill of exchange in his own name for the amount, which C. accepted and paid. A. subsequently became bankrupt, whereupon B. & Co. disavowed the transaction, and called upon C. for payment. This C. refused,—alleging that he had already paid the broker,—and, as B. & Co. refused to deliver the goods, he brought trover against them in order to obtain possession of the same. It was contended on behalf of B. & Co. that, as C. had paid the broker and not them, they were entitled to the goods; but Gibbs, C. J., held, that inasmuch as B. & Co. had suffered their broker on some occasions to draw bills in his own name, without mention of them as his principals, they were bound by the payment which had been made to him by C. in the present instance, and that in consequence C. was entitled to the goods.(x)

\*Such are the circumstances under which, and the [ \*107 ] modes in which, payments made to a broker will in general bind his principal. There is however a further requisite in order to give this effect to such payments, and that is,—that they must be made expressly on account of the particular debt from which the buyer seeks to be discharged; and therefore, where the defendants were indebted for two parcels of goods which they had purchased from different parties by the intervention of the same broker, and for which they had accepted a bill drawn on them by the broker, the amount of which bill was greater than the price of either parcel, but less than that of the two together, and no specific appropriation of which to either parcel had been made at the time;—it was held, that the payment so made should be apportioned between the respective owners of the goods, and that the principal might recover for the difference.(y)

We have seen that the purchaser of goods from a factor, who acts for an undisclosed principal, may set off a debt due from the factor to himself, against a claim made by the principal for the price of such goods. But where goods are sold through the intervention of a broker, it is otherwise. This is owing to the difference which exists between the character of a broker, and that of a factor. The latter, it will be remembered, has the power of selling in his own name; and when he does so, the law places the vendee in the same situation, after the discovery of the principal, as he was before, and allows him therefore to assert against the principal any claim of set-off which he might have asserted against the factor. But when a broker sells goods without disclosing the name of his principal, he acts beyond the scope of his authority; his principal therefore, is not bound by the consequences of such sale, and hence he cannot be affected by any claim of set-off which may exist between the broker and the [ \*108 ] vendee.(z) \*It appears moreover, that it will be suffi-

(x) *Townsend v. Inglis*, Holt, N. P. C. 278, (3 E. C. L. R.)

(y) *Favenc v. Bennett*, 11 East, 36.

(z) *Baring v. Corrie*, 2 B. & Al. 137.

cient to deprive the purchaser of this right, if he knew that the seller was a broker, even without knowing that he acted as a broker in the particular instance; and that where it is doubtful whether a party sells as a broker or not, it is the duty of the buyer to make inquiry in order to satisfy himself of the fact.(a) If, however, the principal enables the broker to mislead the purchaser,—as by delivering to him either the possession of, or the indicia of property in the goods to be sold,—it will be otherwise.(b)

It has been made on various occasions a matter of question,—whether a broker who adjusts a loss on a policy of insurance has any authority to bind his principal, except by receiving payment of such loss in money; or whether, on the contrary, the underwriter has the right of setting off the amount of any premiums which may be due from the broker to him, against the claim of the assured for such loss.

The first case in which this point appears to have arisen, was that of *De Gamind v. Pigou*,(c) and it was there held,—that, in an action against an underwriter for a loss, he cannot set off premiums due to him from the broker, unless he can make it appear that the state of the relative accounts between the assured, the broker, and himself, is such as to take the case out of the ordinary rule, namely,—that the receipt of the underwriter for the premium is conclusive evidence for the assured, that the premium has been actually paid to him.

The same question afterwards arose in the case of *Todd v. Reid*,(d) [ \*109 ] That was an action by the assured against an underwriter, and the question was,—whether the loss had been paid. The policy had been adjusted between the broker and the defendant, and part of the sum for which the latter had subscribed the policy had been paid over to the plaintiff. At the time of settling the loss the broker was indebted to the underwriter for premiums of other policies of insurance,—to which policies, however, the plaintiff was not a party,—in a sum equal to the residue of the money due on the policy in question. This sum was allowed in account between the broker and the underwriter; and it was contended that this was to be considered as a payment to the assured to that amount. It was proved at the trial, that it had been the practice at Lloyd's, for many years, thus to settle losses between the broker and underwriter; but the learned judge who tried the cause was of opinion that the broker, as agent of the assured, was only entitled to receive payment in money, and that no usage could sanction such a practice as that which was stated to have prevailed in this particular business. This decision was afterwards confirmed by the whole court.

In the next case in which the question occurred, the facts were the same as those in the case just quoted, except that the amount of the loss had not only been allowed in account between the broker and the underwriter, but had also been passed to the credit of the assured in the account between him and the broker, and a bill drawn by the assured and accepted by the broker for the balance. This, it was contended, amounted to an agreement by the assured, to accept the

(a) *Baring v. Corrie*, *supra*.  
(c) 4 Taunt. 246.

(b) *Ib.* and see *Bell's Princip. Law of Scotland*, § 573.  
(d) 4 B. & AL. 210, (6 E. C. L. R.)

broker as his debtor instead of the underwriter, and must, as between the underwriter and the assured, operate as a payment of the loss in question; but the court decided to the contrary; resting their opinion, however, chiefly on the ground, that, at the time of the settlement, the name of the underwriter had not been struck off the policy.(e)

\*The same point was again discussed in the case of [ \*110 ] *Bartlett v. Pentland*; (f) and there, in addition to there being evidence of the allowance of the loss in account between the parties, according to the usage at Lloyd's, and of the giving of a bill by the broker to the assured for the balance, as in the case of *Russell v. Bangley*; there was also evidence, that at the time of the settlement the underwriter's name had been struck off the policy. There was however no proof that the name of the underwriter had been struck out with the consent of the assured; nor was it shown that the brokers had any express authority to settle the loss in question according to the usage at Lloyd's, or that the assured knew of such usage, or that the course of dealing between the broker and himself was such as to raise an implied authority in the former to comply therewith; and for these reasons, the court held the underwriter liable.

In the subsequent case of *Scott v. Irving*, (g) this right of set-off in the underwriter by virtue of the above usage, was again asserted, and it was again disallowed by the court, on the broad ground, that the assured was not shown to be cognizant of it. The authority of the broker, it was said, was *prima facie* to receive payment in money. A special authority might be given to receive payment in some other mode; and such authority might be inferred from facts, or from some usage to which the assured had assented; but such usage could be binding only on those who were acquainted with it, and had consented to be bound by it.

The effect of these decisions was recently very fully considered by the Court of Exchequer in the following case.

An action was brought by the assured on a policy of insurance, to recover from one of the underwriters the amount of his subscription. The defendant pleaded, amongst other things, that at the [ \*111 ] time the loss was adjusted, D. & Co., the brokers of the plaintiff, were indebted to him, the defendant, in a larger sum of money than the amount at which the loss had been settled, and that, by the authority and with the sanction of the plaintiff, the brokers accepted a credit on account with the defendant as a payment of the said sum, and made themselves liable to the plaintiffs for the same and that he, the plaintiff, discharged the defendant therefrom. In a second plea the defendant set forth the custom between the brokers and underwriters in London, to make these settlements in account by way of payment; and alleged that the plaintiff had knowledge of that custom, and had assented to it, and that the settlement was made accordingly. It appeared in evidence that the plaintiff resided in Liverpool, and that he had for several years employed D. & Co. as his brokers for effecting insurances in London. At the trial several

(e) *Russell v. Bangley*, 4 B. & Al. 395, (6 E. C. L. R.)

(f) 10 B. & C. 760, (21 E. C. L. R.)

(g) 1 B. & Al. 605, (20 E. C. L. R.)

brokers were called, who stated the usage at Lloyd's to be as pleaded, and it was also stated by some of them that the said usage was well known in Liverpool, as well as in London. The jury found a verdict for the defendant; and the court, after a very full argument, and time taken to consider, refused a rule for a new trial:—they being of opinion, that there was at least sufficient evidence to prove the defendant's first plea, and that it was an answer to the action; because, "where an insurance broker or other mercantile agent has been employed to do work for another, in the general course of business; and where the known general course of business is, for the agent to keep a running account with his principal, and to credit him with sums which he may have received by credits in account with the debtors,—with whom he also keeps running accounts,—and not merely with moneys actually received; it must be understood, that where an account is *bona fide* settled according to that known usage, the original debtor is discharged, and the agent becomes the debtor, according to the meaning and intention, and with the authority of the principal." (h)

[ \*112 ] \*The result of the above cases may be stated to be as follows.

*First; Prima facie*, the broker cannot bind his principal by receiving payment of a loss on a policy of insurance, unless such payment be made in money. (i)

*Secondly*; If the broker receive a credit in account with the underwriter, for the amount of a loss, and, after giving credit to the assured for the same in his account with him, permit the assured to draw on him for the balance, the underwriter will be discharged; provided, at the time of the settlement, the name of the underwriter be struck off the policy with the privity and consent of the assured. (k)

*Thirdly*; If the ordinary course of dealing between the principal, his broker, and the underwriter, has been for the broker to set off sums due from the underwriter to his principal for losses, against sums due from himself to the underwriter for premiums, &c., and to give credit to his principal in his account with him, as well for sums which he may have received by such credits in account with the underwriter, as for moneys actually received (l); or if it be proved that the general course of business is such, and that the principal was cognizant of it, such settlement in account will discharge the underwriter. (m)

*Fourthly*; It will not be necessary to prove that the principal had precise knowledge that such was the general course of business. Proof that it was known amongst mercantile men in the place where he carried on his trade will be sufficient. (n)

*And Lastly*; If the principal, after being informed of the state of accounts between the broker and the underwriter, delay enforcing his claim, and in that interval the relative situation of the broker and

[ \*113 ] underwriter be changed,—as by \*his giving the former fresh credit for premiums in account,—the assent of the

(h) *Stewart v. Aberdeen*, 4 M. & W. 211. 228. (\*)

(i) *Todd v. Reid*, *supra*.

(j) *Per Littledale, J. Bartlett v. Pentland*, *supra*.

(m) *Bartlett v. Pentland*, *Scott v. Irving*, *Stewart v. Aberdeen*.

(n) *Stewart v. Aberdeen*, *supra*.

(k) *Russell v. Bangley*, *supra*.

principal to the usage will perhaps be presumed, so as to operate as a discharge to the underwriter.(o)

These observations, however, apply only to cases in which the principal is the plaintiff in the cause; for, where the broker sues on the policy, any defence which is good against him, will be good against the principal; on the ground,—that a trustee suing in a court of law must be treated in all respects as if he were the real plaintiff in the cause. And therefore, where a broker in whose name a policy of insurance under seal was effected, brought an action of covenant thereon, and the defendant pleaded payment to the plaintiff according to the tenor and effect of the policy: and the proof was,—that after the loss happened, the assurers paid the amount to the broker by allowing him credit in account for premiums due from him to them;—it was held, that, although that was no payment as between the assured and assurers, it was a good payment as between the plaintiff on the record and the defendants, and that, therefore, it was an answer to the action.(p)

There can be no doubt that payment to a factor or broker of the amount due on a bill of exchange or other negotiable instrument will bind the principal, provided the factor or broker have possession of such instrument at the time the payment is made.(q)

It is equally clear, that in all cases in which payment to a factor or broker will bind the principal, he will also be bound by a tender made to the factor or broker;(r) and it appears that, even where the agent has no authority to \*receive payment, so that a [ \*114 ] tender to him would not bind his principal, still, if the latter, after being informed that a tender has been made to his agent, do not disclaim it on account of the agent's want of authority, he will be bound thereby.(s)

In the instances already given with reference to the power of a factor or broker to bind his principal, we have assumed that, at the time of entering into the contract, the agent was possessed of at least some authority, express or implied, to enter into such contract, and thereby to bind his employer. We have already seen however, that if the principal with full knowledge of the facts, ratify the act or omission of his factor or broker, this will exonerate the latter from the consequences of any breach of duty of which he may have been guilty; and in like manner it is well settled, that wherever a specific appointment of an agent is necessary, in order to enable him to bind his principal to third parties, a subsequent recognition of acts done by him in that capacity, will have this effect, as much as if they had been done by virtue of a previous authority.(t) Thus, where a broker, without authority, made a contract in writing for the purchase of goods by B., and B. subsequently ratified the contract; it was held, that such ratification rendered the broker an agent sufficiently autho-

(o) Per Lord Tenterden and Taunton, J., *Scott v. Irving*, *supra*.

(p) *Gibson v. Winter*, 5 B. & Ad. 96, (27 E. C. L. R.)

(q) *Owen v. Barrow*, 1 Bos. & Pul. N. R. 101. 103.

(r) *Goodland v. Blewith*, 1 Camp. 447; Per Parko, B., *Kirton v. Braithwaite*, 1 M. & W. 310. 313.(\*)

(s) *Jackson v. Jacob*, 5 Scott, 79.

(t) *Jones v. Bright*, 5 Bing. 533, (15 E. C. L. R.)

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rized to make the contract under the statute of frauds.(x) So where A. entered into a contract for the sale of a quantity of oil without the authority or knowledge of B., and B., on receiving information of the circumstance, refused to be bound, but afterwards assented by parcel, and samples of the oil were accordingly delivered to the vendees; it was held, that B.'s ratification of the contract rendered it binding upon him.(x)

[ \*115 ] It appears, moreover, that slight evidence of such ratification \*will be sufficient to bind the principal. Where therefore, the broker who signed the broker's note upon a sale of corn was the seller's agent, but the buyer acted upon the note, by sending a servant to examine the bulk of the corn, on the authority of such note, Lord Ellenborough held, that that was such an adoption of the broker's agency as to make his note sufficient within the statute of frauds.(y)

We have likewise seen, that where the question is between the factor or broker and his principal, the latter cannot adopt the acts of the former in part, and reject them in part. And in like manner, where the question is between the principal and third parties, if the agency be adopted at all, it must be adopted throughout; or in the words of a learned judge, it must be taken *cum onere*.(z)

## [ \*116 ] \*CHAPTER II.—SECTION II.

### ON THE POWERS OF FACTORS AND BROKERS.

#### PART III.

##### ON THE FACTOR'S POWER TO PLEDGE.

WE have treated hitherto of those powers only, which are possessed by factors and brokers by the common-law. We now come to treat of the factor's power to pledge,—a power which, in its present state, is regulated almost entirely by statute.

Few subjects have given rise to more discussion in our courts, than that which we are now about to consider; and there are few on which the opinions of our most eminent judges have been more divided—not so much as to the extent to which, prior to the passing of the "factors' acts," the power in question did exist according to our law; but chiefly as to the expediency of allowing it to exist at all. The rule—that a factor had no power to pledge the property of his principal—was, on the one hand, upheld "as one of the greatest safeguards which the foreign merchant had in making consignments of goods to be sold in

(x) *Maclean v. Dunn*, 4 Bing. 722, (15 E. C. L. R.)

(z) *Soames v. Spencer*, 1 Dow. & Ry. 32, (16 E. C. L. R.)

(y) *Kinnitz v. Surrey*, cited *Paley on Agency*, 171.

(z) *Per Ellenborough, C. J., Hovill v. Pack*, 7 East, 164, 166.

this country,"(a) and because of its having thereby "operated much to increase the foreign commerce of the kingdom;"(b) whilst on the other, its policy was questioned, on the ground "that when the owner of property concealed himself," it was nothing but justice that "whoever could prove a good \*title under the person whom the owner permitted to hold it, should retain that property [ \*117 ] against the owner."(c)

Which of these opinions was the better founded, it is not for us now to say; and indeed any speculation on such a question would be out of place in a practical treatise like the present. Laying aside therefore all discussion as to the policy either of the former or present state of the law on this point, we shall confine ourselves in this section to the consideration of the following subjects:—*first*; the state of the law with reference to the factor's power to pledge, prior to the passing of the statutes, 4 Geo. 4, c. 83, and 6 Geo. 4, c. 94: *secondly*; the decisions which have taken place on those statutes: and *thirdly*, we shall endeavour to deduce from those decisions, taken in connexion with the provisions of the "factors' act" recently passed,(d) the present state of the law on this subject.(e)

First then, let us see what was the state of the law as regarded the factor's power to pledge, prior to the interference of the legislature with reference thereto.

The earliest reported case on the subject of a factor's power to pledge is that of *Paterson v. Tash*.(f) That case was tried before Lee, C. J., at Guildhall, at the sittings in Hilary Term, 16 Geo. 2; and the report states, that it was held by that learned judge;—that although a factor had power to sell, and thereby to bind his principal, yet he \*could not bind or affect the property of the goods by [ \*118 ] pledging them as a security for his own debt.

The next case in which the question arose was that of *Daubigny v. Duval*;(g) and there the point raised was,—not whether a factor had power to pledge the goods of his principal for an advance made to himself *simpliciter*,—but, whether the circumstance of the factor being in advance to his principal, and thereby having a lien on the goods, conferred on him the power of pledging them to the extent of his lien. The court however held; that a lien, being a personal right, could not be transferred to a pawnee; and that therefore, in the case then under consideration, the principal, by having tendered to the factor the sum due to him, had entitled himself to maintain trover against the pawnee for the goods. It was however afterwards decided,—that although no lien was transferred by the pledge of the factor under such circumstances as the above, still that this doctrine must be taken to apply, only to the case of a tortious transfer of the goods of the principal

(a) Per Abbott, C. J., *Queiroz v. Trueman*, 3 B. & C. 342, 350, (10 E. C. L. R.)

(b) Per Bayley, J., *ib.* 351.

(c) Per Best, C. J., *Williams v. Barton*, 3 Bing. 139, 145, (11 E. C. L. R.)

(d) 5 & 6 Vic. c. 39.

(e) For the opinions of the different judges on the expediency of the rule mentioned in the text, the reader is requested to consult the following authorities. *Daubigny v. Duval*, 5 T. R. 604; *Pultny v. Kymer*, 3 Esp. 189; *Martini v. Colea*, 1 M. & Sel. 140; *Graham v. Dyster*, 6 M. & Sel. 1; *Queiroz v. Trueman*, 3 B. & C. 342, (10 E. C. L. R.); *Williams v. Barton*, *supra*; 1 Bell, Com. on Merc. Jur. 483; *Story on Bail*, 215, 217.

(f) 2 Strange, 1172.

(g) 5 T. R. 604.

effected by the factor undertaking to pledge them as his own; and not to the case of one who, intending to give a security to another to the extent of his lien, delivers over the actual possession of goods on which he has the lien to that other, with notice of his lien, and appoints that other as his servant to keep possession of the goods for him,—in which latter case, the court were of opinion that the lien might be preserved.(h)

After the decision of the above cases of *Paterson v. Tash*, and *Daubigny v. Duval*, it does not appear to have been disputed, that a factor had no power to pledge the goods of his principal for his own debt. But in the subsequent case of *Newsom v. Thornton*,(i) it was [ \*119 ] asserted,—that although \*a factor could not pledge the goods of his principal by actually depositing them in the hands of a third person, still he might do so by making a deposit of the bill of lading as the symbol of the goods; and that such deposit of the bill would confer a good title on the pledgee to the property therein contained.

The ground on which this power was claimed for the factor appears to have been this;—that the owner of goods who placed them in the hands of a factor for sale, had no means of marking the goods themselves in such manner as to show in what capacity the factor held them, and that the law therefore must protect him, in case the factor should exceed his authority by pledging such goods. But with respect to a bill-of-lading the case, it was argued, was different;—inasmuch as the owner had the means, by an indorsement on the instrument itself, of informing every person into whose hands that instrument might come, that the person who had possession thereof held the same as factor only; and it was accordingly contended, that the possession of the bill-of-lading by the factor without any indorsement to that effect, must be taken as evidence that he had the absolute control over the property, so as to be able to pass it to a third person, who had no notice to the contrary, by indorsement and delivery of such bill-of-lading to him for a valuable consideration.(k) The court however were of opinion, that these circumstances did not confer on the factor any additional power; that the symbol could not have a greater operation to enable him to defraud his principal, than the actual possession of that which it represented; that a factor, therefore, could have no power to pledge the goods of his principal by depositing the bill-of-lading in the hands of a third person, any more than he had the power to do so by so depositing the goods themselves; and that the pledgee, in such a case, would have no ground to complain of his [ \*120 ] \*having been misled by the bill-of-lading, as it would be easy for him to inquire for the letter of advice which brought such bill,—which letter, it was said, would show whether the pawnor held the goods as factor or vendee.(l)

It thus became an admitted principle in our law, that a factor had no power to pledge the property of his employer for his own debt, either by an actual deposit of such property with the pawnee, or by placing in his hands the bill-of-lading, as the symbol of such property; and the same rule

(h) *Men v. Shiffner*, 2 East, 523; *McCombie v. Davies*, 7 East, 5.

(i) 6 East, 17.

(k) Per Erskine and Garrow, arguing; *Newsom v. Thornton*, *supra*.

(l) See also *Martini v. Colea*, 1 M. & Sel. 140; *Shipley v. Kymcr*, ib. 484; *Queiroz v. Trueman*, 3 B. & C. 342, (10 E. C. L. R.)

was afterwards extended to those cases in which the factor,—being possessed of a warrant or order for the delivery of goods from the warehouse in which they were deposited,—pledged such warrant or order as a security for advances to himself:—it being held, that the possession of such an instrument by the factor was not sufficient evidence of his ownership in the goods to be delivered thereunder, to entitle the pledgee to hold the principal bound by such pledge, and that, before the principal could be so bound, it must be shown, that he had armed the factor with such other indicia of property in the goods, as to enable him to deal with them entirely as his own.<sup>(m)</sup>

And not only did the courts deny to a factor the power of pledging the property of his principal for advances made to himself, but they enforced this rule with equal stringency even in cases where the advances, on account of which the goods were pledged, had been made, either to pay the duties chargeable on such goods, or for some other purpose connected with the sale thereof; or where they had been made in order to meet bills drawn by the principal on the factor, for the whole or part of the price of the goods so pledged.

On this subject indeed Lord Ellenborough and Mr. Justice \*Le Blanc seem to have entertained a contrary opinion. [ \*121 ] In the case of *Martini v. Coles*, the former is reported to have expressed himself thus. "If the defendants (the pawnees) had advanced money for any purposes connected with the sale, and for which brokers in the ordinary course of disposing of goods are accustomed to advance it, they would have had a lien in respect of such advance;" and in the same case Mr. Justice Le Blanc is reported to have said,—“consignments are frequently accompanied with a bill drawn on a factor for part of the price of such consignments;” and from this fact the learned judge came to the conclusion, that “if advances were made, merely to take up the bill of the consignor, and were appropriated to that purpose, there would be no mischief,—as that might be considered to be in furtherance of the authority given by the principal.”<sup>(n)</sup> The former of these dicta however was never confirmed by any express decision,—the only case in which the question seems to have arisen<sup>(o)</sup> having been decided on another ground;<sup>(p)</sup> whilst with reference to the latter it was afterwards expressly held;—that even where the principal did draw on the factor in anticipation of the proceeds of a consignment of goods made to him, this circumstance gave the latter no power to pledge these goods,—at least, not if the pawnee knew, or had the means of knowing, that he was dealing with a factor and not with a principal;<sup>(q)</sup> and thus the rule,—that a factor could not pledge the goods [ \*122 ] of his employer, was firmly established, against all the attempts which had been made to engraft exceptions on it.

(m) *Boyson v. Coles*, 6 M. & Sel. 14; *Barton v. Williams*, 5 B. & Al. 395, (7 E. C. L. R.); *Williams v. Barton*, 3 Bing. 139, (11 E. C. L. R.)

(n) *Martini v. Coles*, 1 M. & Sel. 147. 149. (o) *Solly v. Rathbone*, 2 M. & Sel. 298.

(p) It may be mentioned here that Lord Eldon seems to have entertained an opinion on this point, similar to that mentioned in the text. See *Pultney v. Kymor*, 3 Esp. 282.

(q) *Graham v. Dyster*, 6 M. & Sel. 1; *Fielding v. Kymer*, 2 Brod. & Bing. 639, (6 E. C. L. R.) Although the absence of the qualifying circumstance stated in the text, might perhaps have made no difference in the opinion of the court upon the cases cited, still it has been thought proper to introduce it, because in both those cases it was mentioned by the judges as one of the grounds of their decision.

Such, it is believed, is a correct summary of the law on the subject now under review, as it stood prior to the passing of the "Factors' Acts;"—let us now, in the second place, consider the provisions of these acts, and the various cases which have been decided thereon.

As has been already observed, the restrictions thus imposed upon the power of a factor to pledge were far from receiving the unanimous approval of the Bench; whilst, among mercantile men, an almost universal opinion was entertained to the effect,—that a factor or commercial agent, intrusted by his principal with the possession of or the indicia of property in goods, should be deemed to be the true owner thereof, in respect of third persons dealing with him fairly in in the course of business, whether they dealt with him as purchasers or pawnees, provided they were in ignorance of his real character.<sup>(r)</sup> The result of this opinion was, that the matter was brought under the notice of the legislature; and accordingly, in the year 1823, a statute was passed,<sup>(s)</sup> by the provisions whereof the law was very considerably modified. This statute however was not considered sufficient to answer the end proposed; and the consequence was, that about two years afterwards another statute was passed,<sup>(t)</sup> the object of which, as set forth in the preamble, was, to alter and amend the former statute, and to make further provisions in relation to the contracts and agreements therein mentioned.

By this last mentioned statute, it was enacted as follows.

[ \*123 ] \*That a person intrusted with and in possession of a bill-of-lading, India-warrant, dock-warrant, warehouse-keeper's or wharfinger's certificate, or any warrant or order for the delivery of goods, should be deemed the true owner of the goods described therein, so far as to give validity to any contract or agreement made by him for the sale or disposition of the goods, or the deposit or pledge thereof, if the buyer, disposer, or pawner, had not notice by the document or otherwise, that such person was not the actual and *bonâ fide* owner of the goods.<sup>(u)</sup>

But if such deposit or pledge were made as a security for a pre-existing debt or demand, the person taking the same without notice, should acquire such right, title, or interest in the thing pledged, as was possessed by the person making the deposit or pledge, but no other.<sup>(x)</sup>

That any person might accept any goods, or any such document as aforesaid, on deposit or pledge from any factor or agent, notwithstanding he had notice that the party was a factor or agent; but that in such case, he should acquire such right, title or interest only, as was possessed by the factor or agent at the time of the deposit or pledge.<sup>(y)</sup>

And by the *sixth* section it was enacted:—that the act should not prevent the true owner of goods from recovering them from his factor or agent before a sale, deposit, or pledge, or from the assignees of such factor or agent in the event of his bankruptcy: nor from recovering from the buyer the price of the goods, subject to any right of

(r) Abbott on Ship. 461, 6th edit.

(t) 6 Geo. 4, c. 94; see Appendix.

(s) 4 Geo. 4, c. 63; see Appendix.

(u) Sec. 2.

(x) Sec. 3.

(y) Sec. 5.

set-off on the part of the buyer against the factor or agent: nor from recovering the goods deposited or pledged, upon repayment of the money, or restoration of the negotiable instrument advanced on the security thereof to the factor or agent; or upon payment of such further money, or restoration of such other negotiable \*in- [ \*124 ] strument (if any) as might have been advanced by the factor or agent to the owner, or on payment of money equal to the amount of such instrument: nor from recovering from any person any balance remaining in his hands as the produce of a sale of the goods, after deducting the money or negotiable instrument advanced on the security thereof. And that in the case of the bankruptcy of the factor or agent, the owner of the goods so pledged and redeemed should be held to have discharged *pro tanto* his debt to the estate of the bankrupt.(z)

By the above statute then it appears, that the legislature intended to confer on a factor the power of pledging the property of his principal, by depositing in the hands of the pledgee the documents therein enumerated in the following cases.

*First*; Where the pledgee made advances to the factor on the faith of such deposit, without notice of his being a factor.(a)

*Secondly*; Where he made such advances, but with notice that the person with whom he was dealing held the documents pledged, as a factor only;—in which case the pledgee was to have no greater lien on the goods pledged, than the factor himself could have enforced against his principal at the time of such pledge.(b)

*Thirdly*; Where the deposit or pledge was made by the factor, as a security for a pre-existing debt;—in which case, as in the last, the lien of the pledgee was likewise to be measured by that which the factor himself could have enforced against his principal, at the time of the pledge.(c)

And,—as by the common law, the owner of goods [ \*125 ] which \*had been pledged by a factor in contravention of his authority, had the power of recovering such goods or the proceeds thereof from the pledgee,(d)—so by the *sixth section* of the act, power was reserved to such owner to follow his goods whilst in the hands of his factor, or,—in case of the bankruptcy of the latter,—whilst they were in the hands of his assignee; or to recover them from any third person with whom they might have been pledged, on paying his advances secured upon them.

The cases which have been decided on the above statute, may be considered under the following heads:—

1st. As to the character in which it has been decided, that the pawnor must appear to have held the property pledged.

2nd. As to the nature of the transfer which has been had to constitute a “pledge,” or a “sale or disposition” within the meaning of the act.

(z) The statute likewise contains certain provisions respecting fraudulent pledges by factors. These however will be more properly noticed hereafter. The above abstract is taken almost *verbatim* from that by the late Lord Tenterden; see Abbott on Ship. 481, 482, 6th edit.

(a) Sec. 2.

(b) Sec. 5.

(c) Sec. 3.

(d) See the cases cited ante, pp. 117—121.

3rd. As to the documents which it has been held might be pledged under the act.

4th. As to the advances by the pawnee, which have been considered to be within the meaning of the act.

5th. As to what has been held to constitute such a lien on the part of the factor, as would entitle him to pledge under the 3rd and 5th sections of the act;—and

*Lastly*; As to what has been considered sufficient notice of the true character of the pawnor.

1. On the first of these points it has been decided;—that a pledge by a party holding goods who does not appear to have held them as a factor or agent for the owner, does not bring the case within the above statute.

This was decided in the following case. An action of trover was brought against a warehouseman for goods, and the defendant pleaded, in substance, as follows:—that one R. was possessed of the goods [ \*126 ] in question, and being so \*possessed, applied to one F., to discount a bill-of-exchange for him; that F. agreed to do so, on having the said goods deposited as a collateral security; that R. agreed so to deposit them, and that by the direction of F. they were deposited accordingly with the defendant. That the bill was dishonoured; and that in consequence thereof, the defendant, as the servant of F., detained the goods, as he lawfully might for the cause aforesaid. But the court, on special demurrer, held that the plea was bad, inasmuch as there was nothing in it to bring the case within the statute,—it not being averred that R. was intrusted with the goods in question as a factor or agent for the purpose of sale.(e)

2. With reference to the nature of the transfer which constitutes a "pledge," or "a sale or disposition," within the meaning of the act, it has been held:—that if A., holding goods of B. with a lien on them against him, transfer them to C., the latter cannot, under the *fifth* section of the act, retain them as against B. to the extent of A.'s lien, unless it appear that the transfer was made expressly as a pledge: and therefore, where a factor, who had purchased goods for his principal, was allowed to retain the warrants for the delivery of such goods, as a security for advances which he had made to his principal,—but without power to sell,—and on the failure of the factor it was discovered that the warrants were in the hands of the defendants, and that they had become possessed of them by way of sale, and not by way of pledge; it was held, that the defendants were not intitled to the protection of the *fifth* section of the statute; because the provisions of that section could refer only to a pledge made distinctly as such.(f)

So, on the other hand, it has been decided, with reference to the meaning of the words "sale or disposition" in the *second* section of [ \*127 ] the act,—that the legislature did not \*intend, by the introduction of the term "disposition," to give effect to any transfer which was in its nature distinct from either a sale or a pledge; but that to constitute a "disposition" of property within the meaning

(e) *Jaulerry v. Britten*, 5 Scott, 655.

(f) *Thompson v. Farmer*, 1 Mood. & M. 48, (22 E. C. L. R.)

of the act, there must have been some dealing with reference to it which was in the nature of a sale. And therefore, where it appeared that a transfer of goods had taken place which was not in the nature of a sale, and which, moreover, was not considered to be such a pledge as was contemplated by the statute, such transfer was held not to come within the protection of the statute at all.<sup>(g)</sup>

3. The next topic we proposed to consider was, as to the documents which a factor has been held to have the power of pledging, under the statute 6 Geo. 4, c. 94.

By the *second* section of that statute it is enacted;—"that any person intrusted with, and in possession of any bill-of-lading, India-warrant, dock-warrant, warehousekeeper's certificate, wharfinger's certificate, warrant or order for the delivery of goods, shall be deemed and taken to be the true owner thereof," so as, *inter alia*, to give him the power of pledging the same. It appears then to have been the intention of the legislature, that mere possession should not be taken to give the factor the power to pledge; but that to intitle him so to do, he must be shown to have been "intrusted" with, as well as in possession of, the property pledged; and it therefore became a matter of very great importance to ascertain what was such an intrusting, as to bring parties within the provisions of the act.

The first reported case on this subject is that of *Close v. Holmes*;<sup>(h)</sup> the facts of which were as follow. The \*plaintiffs were [ \*128 ] merchants at Manchester,—having also establishments abroad, and they had been in the habit of employing one H., who resided at Hull, as their commission agent, and of making consignments of goods to him as such agent for sale. The defendant was the registered officer of the Hull Banking Company. In the months of January and February, 1835, two ships,—the *Francis* and the *Dean*,—arrived at Hull with cargoes consigned by the plaintiffs to H. for sale on their account; the bills of lading being transmitted to him, indorsed by the shippers in blank. H. had the goods landed; and he afterwards warehoused both cargoes in his own name;—the former in a bonded warehouse belonging to one Hopwood; the latter in the warehouse of the Hull Dock Company. In June, 1835, H. applied to the Banking Company for an advance of money. They acceded to his application; and on the 17th of June he obtained from the Hull Dock Company, and lodged with the Banking Company, an acknowledgment in writing that they held the cargo *ex* the *Dean* to the order of the banking company; and thereupon the banking company paid H.'s acceptance for 500*l*. The banking company afterwards made an advance on the cargo of the *Francis*;—the delivery order for that cargo being likewise pledged with them as a security; but on neither occasion did H. pledge or produce the bills of lading. The plaintiffs brought trover for both cargoes; the defendants claimed by their plea to hold the goods under the 6 Geo. 4, c. 94, s. 2; and on the trial of the cause, the following objection was taken on the part of the plaintiffs. The act, it was argued, gave validity to pledges by a factor, only of bills-of-lading and other documents of that nature,

(g) *Taylor v. Trueman*, 1 Mood. & M. 453, (22 E. C. L. R.); *Taylor v. Kymer*, 3 B. & Ad. 320. 337, (23 E. C. L. R.)

(h) 2 Mood. & Rob. 22.



evidencing title, and with which the factor might have been intrusted by his principal. But here the banking company had made advances on the faith of a mere delivery order in the one case, and of the warehouseman's acknowledgment in the other,—both of which were instruments created by the factor himself, for the very purpose of [ \*129 ] raising money; and the learned judge who tried the \*cause, (Alderson, B.) allowed the objection to prevail, being clearly of opinion, that the defendant, in order to be intitled to the protection of the statute, must show that H. had been actually intrusted by the plaintiff with the property pledged,—of which however there was no evidence in the case then under consideration. (i)

The same point was afterwards raised, and solemnly decided in the case of Phillips v. Huth. (k) That was an action for money had and received, and it was brought under the following circumstances. The plaintiffs had placed the bills of lading of two cargoes of tobacco in the hands of W. and C. as their factors, for sale. The cargoes were entered by the factors at the custom-house in their own names; this enabled them to obtain dock-warrants also in their own names; and they obtained such warrants for both cargoes accordingly; there was however no evidence, that by the usage of trade, the possession of such warrants by the factors, was necessary, in order to enable them to effect a sale of the tobacco in question. W. and C. afterwards pledged the tobacco to the defendants, by depositing these warrants with them; and they subsequently became bankrupts. The defendants sold both cargoes; and when this action was brought to recover the proceeds, they paid the same into court, less the amount of their advances. The question was, whether, under the 6 Geo. 4, c. 94, s. 2, they were entitled to make such deduction; and in order to decide whether they were or not, the learned judge who tried the cause, (Gurney, B.) left it to the jury to say:—whether the plaintiffs had intrusted W. and C. with these warrants or either of them? This question the jury found in the affirmative. A rule nisi for a new trial was afterwards obtained on the ground that the verdict was against evidence, and also that the direction of the judge had not been [ \*130 ] sufficient in point of law; and the court, \*on cause shown, and after taking time to consider, made such rule absolute,—thereby deciding, that the factors, in this case, had not been intrusted with the dock-warrants, within the meaning of the statute, although by the delivery of the bills of lading to them, their principals had enabled them to procure such warrants in their own names. “It is necessary,” says Parke, B., delivering the judgment of the court, “in order to give effect to this clause, that the owner should have intrusted the factor with the document; not that it is necessary that the owner should have had personal possession of the document, so as to be able to mark it with his name, and himself deliver it to the factor, for if his own agent, general or special, puts it into the hands of the factor with the factor's name on it, or if the factor be instructed by the owner to obtain the document in that state, and does so, no doubt he is intrusted by the owner with it, within the meaning of the act. But in order to constitute an *intrusting* of such document, it

(i) See also per Alderson, B., Phillips v. Huth, 6 M. & W. 572. 580. (\*)

(k) *Supra*.

is necessary that the owner should have intended the factor to possess it in that form, at the time when he had the possession. Intrusting with the document, is essentially different from enabling a person to become possessed of it—from giving him the means of obtaining it. It is not enough therefore to show, that the plaintiffs empowered W. and C. to possess themselves of the warrants whenever they chose; it must be shown that the plaintiffs really intended that the factors should be possessed of them at the time they pledged them; or it must be shown that the plaintiffs meant them not merely to have the power which the bill of lading would give,—of getting the warrants when they (the plaintiffs) liked, but to exercise that power by obtaining them, whenever they (the factors), in their discretion might think fit. If either of these intentions were proved, it would be sufficient; but if the factors were proved to be in possession of the warrants, under such circumstances as that the plaintiffs, if they had been informed of that fact, might justly have said—"we never meant this," it is impossible to say that they intrusted the factors with these [ \*131 ] warrants. If it had been the established usage of trade to sell by dock-warrants only, and to obtain them at the time these were obtained, doubtless there would be a strong case for the jury; for the plaintiffs might fairly be considered, in the absence of express instruction to the contrary, as having intended that the factors should pursue the ordinary and usual course. There was no such proof of its being the usual course, but the contrary; and we think that no inference of intention can be drawn from the mere fact of the delivery of the bills of lading, as to obtaining the warrants, except that the factors should obtain them, if those documents should be reasonably required for the purposes of sale, and at the time when they should be so required." (l)

The principles laid down in the above case, with reference to the meaning of the words, "intrusted with" in the second section of the statute now under consideration, were afterwards fully recognized and confirmed in the case of *Hatfield v. Phillips*. (m) The pleadings and facts of this last mentioned case were in substance the same as those in *Phillips v. Huth*; and in this instance likewise, the learned judge who tried the cause (Lord Abinger) left it to the jury to say,—whether the factor had been intrusted with the property pledged, within the meaning of the act. To this direction a bill of exceptions was tendered,—on the ground that the question was one of law, and not of fact: that the factor being intrusted with the bill of lading, was necessarily and impliedly intrusted with the dock-warrants; or at all events, that the judge should have told the jury what was an intrusting in point of law. The case was afterwards argued in the Exchequer Chamber; and the direction of the learned judge held to have been right. "The bill of lading," says Lord Denman, delivering the judgment of the court, "is *functus officio*, as soon as the goods are landed and warehoused 'in the name of the holder; that holder [ \*132 ] then becomes possessed of the goods themselves in the eye of the law, and any power he may have over them arises, not from the bill of lading, but from such possession. If they are received into

(l) 6 M. &amp; W. 598, 599. (\*)

(m) 9 M. &amp; W. 647. (\*),

his own warehouse, it is clear that neither by the common law, nor by the statute in question, can he pledge the goods; nor will there be any document indicative of title which can bring him within the second section of the statute. If they remain in the dock warehouse, and are only in his constructive possession, he will be authorized to do such acts, and to procure such documents, as are necessary and proper to enable him to sell the goods. To this extent, and no further, is he intrusted, in the absence of any specific instructions and authority."(*n*)

It will likewise be seen on referring to the judgment in the above case, and to that in *Phillips v. Huth*, that the judges were of opinion:—that a factor was not authorized by the statute 6 Geo. 4, c. 94, to pledge the goods of his principal, when he had possession only of the goods themselves, but that to enable him to exercise this power under the statute, it was requisite that he should have in his hands some document showing the title to the goods, which document might be so marked as to show whose goods they were.(*o*)

4. With reference to the advances by the pawnee which were considered to be within the protection of the act, the decisions are as follow.

It was held, that in order to entitle the pawnee to the benefit of the second section, he must have actually advanced money or negotiable instruments, upon the faith of the documents deposited with him in [ \*133 ] that particular transaction; \*and that a mere deposit of documents, in exchange for other documents already in the hands of the pawnee as a security for advances previously made on them, would not be protected. This point was decided in the following case.

*N. & Co.*, who were factors, were instructed to purchase and did purchase for the plaintiffs certain chests of indigo then lying in the warehouses of the East India Company, for which they afterwards got the warrants. Before this time *N. & Co.* had borrowed a large sum of money from the defendants, and had deposited with them as a security, a number of East India warrants for other indigo. *N. & Co.* being in want of some of this indigo, applied to the defendants to deliver to them the warrants for eleven chests; and they obtained these warrants from the defendants on a promise to pay them the value of the said eleven chests in the course of the day. *N. & Co.* failed to do this; and instead thereof they deposited with the defendants, ten of the warrants belonging to the plaintiffs. The plaintiffs brought trover for these ten warrants: and Lord Tenterden, before whom the cause was tried, held that they were intitled to recover. "Holding the warrants originally deposited with them as securities," said his lordship, "the defendants give them up, and receive the warrants in question in exchange. This does not appear to me a transaction within the second section of the statute. It is no pledge or deposit of them as a security for money advanced on the faith of them; for the money for which they are a security was previously due, namely on the former transactions, when the warrants for which they were exchanged, came into the hands of the defendants."(*p*)

(*n*) 9 M. & W. 649.(\*)

(*o*) 6 M. & W. 537;(\*) 9 M. & W. 650.(\*)

(*p*) *Taylor v. Truman*, 1 Meod. & M. 453, (22 E. C. L. R.)

The same question afterwards arose in the case of *Taylor v. Kymer*,<sup>(q)</sup> in which the facts, so far as they relate to our present subject, were substantially the same as those in *Taylor v. Trueman*; and on that occasion likewise, it was \*decided by the whole [ \*134 ] court, that a deposit or pledge, to come within the second section of the act must have been made for money or a negotiable instrument, advanced or given by the pledgee, upon the faith of the documents pledged.<sup>(r)</sup>

But where these advances had been made to a factor on a deposit of American State Bonds; and an agreement was subsequently entered into between him and the pawnee for a further advance of a larger amount, on a deposit by way of security of certain dock-warrants; which second advance was accordingly made, the bonds given up, and credit in account given by the pawnee to the factor for the amount of the second advance, less the discount on the former one, the balance being paid over to the factor:—the court were of opinion that these circumstances were not sufficient of themselves, to deprive the pawnee of the benefit of the statute, as to this second advance; but that the true question was, whether, according to the intention of both parties, the money advanced on the security of the dock-warrants was meant to be placed entirely at the disposal of the factor, so that he might, without any breach of the understanding between himself and the pawnee, have used the amount for any purpose of his own, notwithstanding which he had directed it to be applied to satisfy the old debt: or whether the money had been received merely for the purpose of its being handed back in order to pay such debt; in which latter case they thought that there would have been no advance within the meaning of the statute, whilst in the former there would.<sup>(s)</sup>

And in the same case the court expressed an opinion to the effect;—that if documents were deposited by a factor \*as a security for the balance of a sum of money,—the whole of [ \*135 ] which sum the pawnee had previously agreed to advance on the faith of other documents which had been pledged with him, but had afterwards refused to do so,—such second deposit would be protected by the act. The pawnee, it was said, might be bound by his contract to advance the residue of the sum agreed to be advanced on the security of the first deposit; but still, if he refused to do so, and the factor, instead of suing him on his contract, chose to pledge such property for an immediate advance, such pledge would be good.<sup>(t)</sup>

And not only were those pledges protected by the statute, which were made as a security for advances of money, but the same protection was extended to cases in which the advance consisted, not of money, but simply of negotiable instruments.<sup>(u)</sup> By “negotiable instruments” however, it has been decided, are meant, such instruments only as bills and notes, which pass by indorsement; and not such instruments as East India warrants, which pass by delivery merely. Where therefore a factor deposited with a third person the

(q) 3 B. & Ad. 320, (23 E. C. L. R.)

(r) See also *Ross v. Willis, Duns. & Lloyd*, Merc. Cases, 19.

(s) *Phillips v. Huth*, 6 M. & W. 600. (\*)

(t) *Phillips v. Huth*, *supra*.

(u) See section 2.

warrants for certain goods, on the faith of such deposit, the pawnee gave up to the factor certain East India warrants for other goods, which the latter had pledged with him for a previous advance,—it was held, that the first mentioned warrants had not been deposited as a security for negotiable instruments obtained on the faith of them, within the meaning of the act.(v)

5. We next proposed to consider the question; what will constitute such a lien on the part of the factor, as will intitle him to pledge, under the *third* and *fifth* sections of the above statute?

[ \*136 ] \*On referring to these sections it will be observed, that where a factor pledges goods for an antecedent debt,(x) or where the pledgee takes such a pledge with notice that the pawnor is a factor,(y) the party taking such pledge is to acquire “such right, title, or interest only, as was possessed and might have been enforced” by the factor, at the time of the deposit or pledge. The following cases will show what is such a “right, title, or interest” as was contemplated by the act.

The plaintiff sent to one B., as his factor for sale, a number of East India warrants for silk, and drew bills of exchange on B., to stand against the proceeds of the silk when sold. These bills B. accepted. B. however could not sell any of the silk before the bills became due; and the plaintiff, in consequence thereof, promised to provide funds to take them up; but this course becoming inconvenient, he proposed that B. should draw bills on him to a certain amount, which bills he would accept, and that B. should discount those bills, and with the proceeds take up his own acceptances. The bills were drawn and accepted accordingly. At the time that B.’s acceptances became due he had discounted only one of the last set of bills, but on that day he pledged the warrants with the defendants, his bankers, for a sum of money,—giving them notice that he held them as factor only; and with this money he paid his acceptances. All the other bills accepted by the plaintiff were afterwards discounted by B., and the proceeds applied to his own use,—the amount however being carried to the

[ \*137 ] plaintiff’s credit, \*in their account current. The plaintiff paid all his acceptances as they became due. B. afterwards became bankrupt, and the plaintiff then discovered that the warrants had been pledged with the defendants, who claimed to retain them on account of their advances to B. The plaintiff accordingly brought trover; and it was held that he was intitled to recover. “The defendants,” said Lord Tenterden delivering the judgment of the court, “could acquire no further or other right, title, or interest than was possessed and could have been enforced by B. at the time of the deposit. The right of B. was to an indemnity against bills of exchange. If in the result of the transaction, B. discharged the bills out of his

(v) *Taylor v. Trueman*, 1 Mood. & M. 453, (22 E. C. L. R.); *Taylor v. Kymer*, 3 B. & Ad. 320, (23 E. C. L. R.) It may not be out of place to mention here, that Lord Tenterden on one occasion expressed himself to be of opinion, that a pledgee would not derive any right to retain goods pledged by a factor, against the true owner, further than that given by the statute, from the mere fact of the owner having delayed to give the pledgee notice, that the goods were his; at least, not unless it appeared that by reason of such delay, the pledgee’s situation had been altered for the worse, or that of the owner for the better. *Robertson v. Kensington, Lloyd & Wels*. 187; 5 M. & Ry. 381.

(x) Sec. 3.

(y) Sec. 5.

own funds, his right would be converted into a lien for money actually advanced, and the plaintiff must repay the money to have the warrants. If in the result of the transaction the bills were all discharged by the plaintiff's money, or by the sale of his goods, the right of B. would cease and become void, and the plaintiff would become intitled to the possession of the warrants. And from the failure of B. this event happened. The plaintiff had the same right to receive the warrants from the defendants as he would have had to receive them from B. We therefore think the defendants had no lien on the warrants."(a)

The same rule was acted upon in the subsequent case of *Blandy v. Allan*; (a) in delivering judgment in which case, Best, C. J.,—before whom the cause was tried,—observed; "It appears to me that the principle of the decision in *Fletcher v. Heath*, is, that liability under acceptances is not sufficient to intitle a man to pledge. In such a case he has only a right to hold, *nomine pæne*, till the liabilities are discharged.

From these cases then it appears, that the lien contemplated by the statute, is not such a lien merely as would \*have intitled [ \*138 ] the factor to retain in his own hands the goods pledged until such lien were satisfied; but that, to come within the meaning of the act, the lien must be such as the factor could have actually enforced at the time of the pledge; or, in other words, that it must be a lien arising out of a money demand. "By right to enforce," says Best, C. J., "I mean, right to call for the payment of money."(b)

It has also been decided, that in order to give a factor such a lien as was contemplated by the *fifth* section of the act, it must appear that upon the face of the whole account between them, the principal is indebted to the factor. This rule is well illustrated by the following case.

A factor, by desire of his principal,—who carried on business on his own account, and also in partnership with M.,—kept separate accounts of transactions, in some of which the principal was solely interested, and in others of which he was interested as partner with M. The factor regularly posted all the items of both these accounts in one general account, distinguishing however the separate account of his principal by the mark "H. K." and the joint account of his principal and M. by the mark "H. R." Goods were consigned to the factor on the joint or H. R." account, and a draft drawn on him by his principal against that account, for the purpose of meeting which he pledged these goods with the defendant. At the time of the pledge, the factor was indebted to his principal upon the general account, in a sum larger than the amount of the draft; but upon the "H. R." account,—against which the draft was drawn,—and to which the goods pledged belonged,—a small balance was due from the principal to the factor:—and it was held that, under these circumstances, the factor had no right to pledge the goods, and that the pledgee could not retain them against the principal.(c)

(a) *Fletcher v. Heath*, 7 B. & C. 517. 524, (14 E. C. L. R.)

(a) 3 C. & P. 447, (14 E. C. L. R.); *Dan. & Lloyd*, 29, 8 C.

(b) *Blandy v. Allan*, *supra*. 451.

(c) *Robertson v. Kensington*, 5 M. & Ry. 381.

[ \*139 ] *\*Lastly.* It is enacted by the *second* section of the statute, that the person with whom the documents of title to goods are pledged, shall be intitled to retain them against the true owner, only in case such person "shall not have notice by such documents or either of them, or otherwise," that the person pledging the same is not the actual and *bonâ fide* owner thereof.

This clause of the statute has been construed very strictly,—the rule as to what shall be considered to amount to notice under it, having been confined within almost the same limits, as those by which it was bounded at common law. We have already seen that, before the passing of the act, parties dealing with a factor were not protected in cases where he exceeded his authority, merely by the fact of their having had no direct notice of the existence of the agency; but that it was held to be the duty of the third parties in such cases, to ascertain the true character of the person with whom they dealt,—especially if any circumstances existed which might tend to create a doubt, as to whether he was, in the particular transaction, concerned as principal, or merely as agent.<sup>(d)</sup> The same rule has been followed in construing the clause in question; and it has accordingly been decided, that the "notice" intended by that clause is not a notice acquired by direct communication; but that, if the circumstances of the transaction were such as that a reasonable man, and a man of business applying his understanding to them, would come to the conclusion that the goods pledged were not the property of the person pledging them, this, in the absence of any other notice, would be sufficient to deprive him of the protection of the statute.<sup>(e)</sup>

[ \*140 ] *\*From this summary of the cases which have been decided on the 6 Geo. 4, c. 94, it will at once be seen, that our courts have evinced no disposition to relax the rules of the common law with reference to pledges by factors, any further than they were warranted in doing, by a very literal construction of the statute in question. Indeed the reader cannot have failed to observe, that the result of all the decisions to which we have adverted in the course of the above summary, was unfavourable to the rights of pawnees; and perhaps it has occurred to him, that owing to the interpretation which our courts appear to have felt themselves bound to give the statute in question, innocent third parties were, notwithstanding its provisions, as much exposed to risk in making advances to factors as they had been before that statute came into existence. A glance at the cases will serve to illustrate this.*

(d) See *Newsom v. Thornton*, 6 East, 17. 43; *Graham v. Dyster*, 6 M & S. 1. 4.

(e) *Evans v. Trueman*, 1 Mood. & Rob. 10. In addition to the points mentioned in the text, it has been decided on the 6 G. 4, c. 94, that a defendant seeking to avail himself of the statute, must prove his contract with the factor; and consequently if there was a written agreement, the defendant must produce it. *Evans v. Trueman*, 2 B. & Ad. 886, (22 E. C. L. R.) It has likewise been held, that when the pawnee, without authority, sells the goods pledged, the owner of the goods may bring trover, without tendering to the pawnee the sum due from himself to the factor, but that in estimating the damages, the pawnee will be intitled to credit for such sum. *Taylor v. Trueman*, 1 Mood. & M. 453, (22 E. C. L. R.); *Taylor v. Kymer*, 3 B. & Ad. 320, (23 E. C. L. R.) And it appears further, that where goods have been improperly pledged, the owner will be intitled to have the damages increased, by adding to the value of the goods the amount of rent and other expenses paid or to be paid to the persons in whose warehouse they have been deposited. *Robertson v. Kensington, Lloyd & Wels*, 187, note.

The *second* section of the act, it may be remembered, contains a proviso to the effect,—that a pawnee shall be intitled to the benefit of that section, only in the event of his having no notice, that the party pledging was not in fact the owner of the goods pledged. In this proviso, there was perhaps nothing unreasonable; but when we find that the term “notice” was held to mean, not merely notice of the agency by direct communication, but any notice arising \*from [ \*141 ] such circumstances as would lead a reasonable man to infer that such agency existed, and when we reflect, moreover, that according to the mode in which mercantile agencies are generally conducted, circumstances of this kind must be found in almost every case,—it becomes evident that instances could very rarely occur, in which the full benefit of that section could be claimed.

Again; the statute enacts that a factor shall not be intitled to pledge the goods of his principal unless he shall have been “intrusted” with the documents of title to those goods. But then, the meaning given to the term “intrusted” was such, as to place it almost beyond the reach of any third party to know when he was dealing with a person “intrusted” within the meaning of the act. In this case indeed, the difficulty seems to be greater even than it was at the common law. We have seen that, at common law, the only duty of the pawnee was, to ascertain whether the pawnor was a principal or a factor. If he made due inquiry on this subject he was safe; and as the factor could seldom fail to have such documents in his possession, as would at once afford the information required, the inquiry was comparatively easy. But with reference to the question; whether the factor was “intrusted” within the meaning of the statute, the case was very different. As was observed in the case of *Hatfield v. Phillips*,<sup>(f)</sup> it was impossible to say what was an *intrusting* in point of law. There might be an express intrusting, by the delivery of a document by the owner to the factor, or by desiring him expressly to procure such document; or there might be an implied intrusting, from the usual course of dealing or other circumstances. Here then there was first, the difficulty of knowing what constituted an intrusting within the meaning of the act; then the difficulty of ascertaining such circumstances as would enable the pawnee to judge, whether the factor had been intrusted or not; and lastly, the risk of his not coming \*to a correct conclusion from these circumstances. With such obstacles [ \*142 ] in their way, it will at once appear, to what hazard mercantile men must have been exposed, in all dealings under the act in question.

The same remark applies to the advances which were held to be protected by the statute. Men not accustomed to construe acts of parliament, would not very readily detect the difference between advances made on the faith of documents, and a deposit of documents made in exchange for others on which advances had been already made; nor would they at first sight discover, that by the term “negotiable instruments” was meant, such instruments only as passed by indorsement and delivery, and not such as passed by delivery merely. And thus, although the intention of the statute was to relax the rules

(f) 9 M. & W. 647. 649. (\*)



of the common law, yet so great was the difficulty of bringing parties within the benefit intended to be conferred by it, that its effect as a measure of protection to mercantile men, was rendered almost nugatory.

The law continued in this state until nearly the close of the session of parliament 1841—42; but it having been found productive of much inconvenience,—owing to the extent to which mercantile agents were intrusted with the property of others, and the frequency with which advances were made on the security of such property,—the legislature thought it expedient again to interfere, for the purpose of extending the provisions of the statute 6 Geo. 4, c. 94, and establishing the law with reference thereto, on a clear and certain basis.(g) Accordingly the statute 5 & 6 Vic. c. 39, was passed; the provisions of which, in so far as they relate to our present subject, are shortly as follow.(h)

By section 1st it is enacted: That any agent intrusted with the possession of goods, or of the documents of title to goods, may make a [ \*143 ] valid pledge of the same, as well for any \*original advance *bonâ fide* made on the security thereof, as for any continuing advance in respect thereof, notwithstanding the pledgee shall have notice that the person pledging is only an agent.

Section 2nd enacts: That contracts for pledge made in consideration of the transfer to such agent of any other goods, documents of title, or negotiable security, on which the pledgee had at the time a valid and available lien in respect of previous advances, if *bonâ fide* on the part of the person with whom the contract is made, shall be considered as valid and effectual as if the consideration of the contract had been a *bonâ fide* present advance of money. But the pledgee, in such case, is to acquire no lien on the goods, &c. deposited in exchange, beyond the real value of the goods, &c. exchanged.

Section 3rd enacts: That the act shall not be construed so as to protect any contract not made *bonâ fide*, and without notice that the agent has no authority to make the same, or that he is acting *malâ fide* in so doing; nor so as to protect any lien or pledge for any antecedent debt.

Section 4th explains the meaning of the term “document of title:” it then goes on to enact;—that “any agent intrusted as aforesaid and possessed of such document of title, whether derived immediately from the owner of such goods, or obtained by reason of such agent’s having been intrusted with the possession of the goods, or any other document of title thereto” shall be taken to have been “intrusted” within the meaning of the act;—that such agent shall be taken to be “possessed” of goods, &c. within the meaning of the act, whether the goods, &c. be in his actual custody, or be held by some other person for him;—that advances made *bonâ fide* to such agent, on the faith of any agreement in writing to deposit goods, &c. shall be taken to be within the meaning of the act, provided such goods, &c. shall be actually [ \*144 ] received by the person making the advance, \*without notice of such agent’s want of authority, although they should not be so received until a period subsequent to the making of the advance;—that any agreement, whether made with such agent

(g) See the preamble to statute 5 & 6 Vic. c. 39.

(h) For the statute see Appendix.

or with a clerk or other person on his behalf, shall be taken to be an agreement with such agent;—that the term “advance” shall extend to any payment, whether made in money, bills of exchange, or other negotiable securities:—and that the mere possession of goods, &c. by such agent shall be evidence of his having been “intrusted” therewith; unless the contrary be made to appear.<sup>(i)</sup>

It would appear, therefore, that the present state of the law with reference to pledges by factors, is as follows.

A factor who is intrusted with the possession either of goods or of the documents of title to goods, may now deposit the same by way of pledge, lien, or security for advances made to himself;<sup>(k)</sup> whereas under the 6 Geo. 4, c. 94, the mere possession of the goods themselves, was not sufficient to intitle a factor to pledge,—that statute having been held, as we have seen, to give him such power, only when he was possessed of some document of title, which could be so marked by the owner as to show to whom the goods belonged.<sup>(l)</sup>

In like manner, a factor had no power under the 6 Geo. 4, c. 94, to pledge the property of his principal to a greater extent than the amount of his own lien upon it, where the pawnee knew that he was dealing with a factor only. But \*it appears that now, the pawnee will be protected to the full extent of his advances, [ \*145 ] even although at the time of making them he had such notice:<sup>(m)</sup> and that the only circumstances which will deprive him of this protection are either,—that the deposit was made on account of an antecedent debt;—or that the advance was not made *bonâ fide* on the part of the pawnee;—or that he had notice that the factor had no authority to pledge, or that, in so doing, he was acting *malâ fide* against the owner of the property pledged.<sup>(n)</sup> And where the advance is *bonâ fide* made, not on account of an immediate deposit, but in consideration of a written contract to deposit goods or documents of title, notice to the pawnee of the factor's want of authority to make such deposit will not invalidate the contract, unless it be received by him before the goods or documents of title have been actually deposited with him.<sup>(o)</sup>

We have likewise seen that, under the former statute, a factor had no power to pledge any document of title which was not derived immediately from the owner of the goods; and that, even although the principal had so far intrusted the factor as to enable him to procure such document in his own name, this was not considered to be sufficient evidence of his having intrusted him, so as to intitle him to pledge.<sup>(p)</sup> But it seems that now, mere possession by the factor is to be considered *primâ facie* evidence of his having authority to pledge: and that where he is possessed of any document of title to goods, he will be taken to have been intrusted therewith, so as to be intitled to pledge the same, whether such document was in fact derived immediately from the owner, or has been obtained by the factor by reason

(i) The statute likewise contains provisions respecting fraudulent pledges by agents, (sec. 6;) and also respecting the right of the owner of goods to redeem the goods pledged, or to recover the balance of the proceeds thereof, (sec. 7,) similar to those contained in the 6 Geo. 4, c. 94.

(k) 5 & 6 Vic. c. 39, s. 1.

(l) See *Phillips v. Huth*; *Hatfield v. Phillips*, ante p. 132.

(m) 5 & 6 Vic. c. 39, s. 1.

(n) *Ib.* sec. 3.

(o) *Ib.* sec. 4.

(p) *Closs v. Holmes*; *Phillips v. Huth*; *Hatfield v. Phillips*, ante pp. 127—132.

of his having been intrusted with the possession of the goods, or of some other document of title thereto.(g)

[ \*146 ] \*So under the 6 Geo. 4, c. 94, no pledge by a factor was valid, unless for advances made expressly on the faith of the documents pledged.(r) But now, a valid pledge may be made, either for an original, or a continuing advance;(s) and where an advance has been already made to a factor, on the security of goods, documents of title, or negotiable securities, and these are given up in consideration of the deposit by the factor of other goods, documents of title, or negotiable securities, the pledgee will have a lien on this second deposit to the extent of the value of the goods, documents of title, or negotiable securities given up in consideration thereof.(t)

The law with reference to pledges made on account of antecedent debts will, it is presumed, be still regulated by the 6 Geo. 4, c. 94, s. 3: for, although the third section of the 5 & 6 Vic. c. 39, expressly declares,—that nothing in the last mentioned statute shall be construed to protect any lien or pledge for any antecedent debt,—yet it is submitted, that this does not operate as a repeal of the 6 Geo. 4, c. 94, s. 3, inasmuch as the two enactments are perfectly reconcilable.(u) On referring to the *second* and *third* sections of the last mentioned statute it will be found, that they protect pledges by factors, whether on account of present advances, or on account of antecedent debts, only in case the pawnee accepts the pledge without notice that the pawnor is a factor. By the *first* section of the 5 & 6 Vic. c. 39, however, this proviso as to notice is repealed, so far as regards pledges within the second section of the 6 Geo. 4, c. 94; and as the only proviso contained in the third section of that act in common with the second, is that as to notice, it would seem to follow, that the clause in the 5 & 6 Vic. c.

[ \*147 ] 39, s. 1, which repeals this proviso as to the latter of these sections, is the only one which could be construed to extend to cases within the former,—that is, to cases of pledge for antecedent debts. Construing therefore the declaration contained in the third section of the 5 & 6 Vic. c. 39, according to this view of this subject-matter, the intention of that declaration would seem to be, rather to prevent the repeal of the proviso as to notice from being extended to cases of pledge for antecedent debts, than to invalidate such pledges altogether: and, if this be so, then we may conclude, that now, as heretofore, a factor may pledge the property of his principal for an antecedent debt, to the extent of his own lien thereon at the time of the pledge, provided the pawnee has not, at that time, notice that the pawnor is a factor.

There is however, one very important particular with reference to pledges of this nature, in which, perhaps, our courts may now be induced in some measure to relax the law as settled by former decisions,—that namely with respect to what shall be considered to constitute such a lien on the part of the factor, as will intitle him to pledge for an antecedent debt.

There is, it is believed, no report of any decision on this point under

(g) *Ib.* sec. 4.

(r) *Taylor v. Trueman*; *Taylor v. Kymes*, ante pp. 132—134.

(s) 5 & 6 Vic. c. 39, sec. 1.

(t) *Ib.* sec. 2.

(u) 11 Co. R. 63, 64. Com. Dig. Parliament, R. 9.

the *third* section of the 6 Geo. 4, c. 94; but as it has arisen under the *fifth* section of that act, the wording of which in this respect is the same as that of the *third*, the cases under that section may be used to illustrate the present question. The reader then will remember that it was decided, that a mere liability under acceptances did not constitute such a lien as would intitle a factor to pledge under the *fifth* section of the 6 Geo. 4, c. 94, (z) and that to give him this power it was held to be necessary, that his lien should be founded on a money demand. In the case of *Fletcher v. Heath*, the reasons on which the court grounded their decision do not appear to have been very fully stated; \*but in that of *Blandy v. Allan* it is otherwise; and, in this latter case, the question seems to have been [ \*148 ] decided chiefly by comparing the *fifth* and *eighth* sections of the act, and interpreting the former by the latter. In delivering judgment in that case, Best, C. J., says: "I think that the *eighth* section renders it perfectly clear, for it says that the factor shall not be liable to prosecution for having deposited goods, provided they are not made a security for the payment of any greater sum of money, than was justly due from the principal at the time of the deposit. This plainly shows, that the liability intended is a pecuniary liability;" and then he goes on to say; "the section further provides that the acceptance of bills of exchange by the factor or agent, on account of his principal, shall not be considered as constituting any part of his debt." By the *sixth* section of the 5 & 6 Vic. c. 39 however, it is enacted;—that no agent shall be liable to prosecution for pledging any goods or documents of title, in case the same shall not be made a security for any greater sum of money than the amount which, at the time of the deposit, was justly due to such agent from his principal, "together with the amount of any bills of exchange drawn by or on account of such principal, and accepted by such agent." By this enactment then the *eighth* section of the 6 Geo. 4, c. 94, is evidently repealed; and therefore,—presuming that in any case in which the question may hereafter arise, the *third* section of that act, instead of being interpreted by the *eighth*, would be interpreted by the *sixth* section of the statute 5 & 6 Vic. c. 39,—it would seem to follow,—that, as the lien of the factor was held to be restricted by the former to the extent of his money demand, so, under the latter, it would be held to include the amount of any acceptances under which he might be liable to his principal; and that such liability would be considered to constitute a sufficient lien, to intitle him to pledge for an antecedent debt.

The Court of Common Pleas, however, have refused to \*sanction a usage which was proved to prevail in Lon- [ \*149 ] don, of allowing to a warehouse-keeper a general lien on all goods deposited with him by a factor, for his advances made in order to pay customs, &c., whether such customs had been paid on account of the particular goods on which the lien was claimed, or not. Such a usage, they thought, was unreasonable and unjust; inasmuch as, by the operation thereof, the goods became pledged for the factor's own debt, under circumstances which were neither sanctioned by the com-

(\*) *Fletcher v. Heath*, 7 B. & C. 517, (14 E. C. L. R.); *Blandy v. Allan*, 3 C. & P. 447, ante pp. 136, 137, (14 E. C. L. R.)

mon law, nor protected by the statute 6 Geo. 4, c. 94.(y) This decision would, it is presumed, be considered good law at the present day, notwithstanding the provisions of the recent factors' act.

Lastly, we may observe, that neither of the above statutes seems to interfere, in any way, with the power of factors or brokers to pledge negotiable securities held by them, for advances made to themselves; and we may therefore conclude that now, as heretofore, the principal will be bound by a pledge by his factor or broker of bills of exchange indorsed in blank,(z)—provided the pawnees accept the pledge under circumstances of perfect good faith.(a)

The same rule holds good with regard to any other instrument which is, by the custom of trade, transferable like cash, by delivery, and on which the holder *pro tempore* has a right to sue;(b) as for [ \*150 ] example, exchequer-bills payable \*to bearer;(c) or bonds payable to the holder.(d) All such instruments are, properly speaking, negotiable; and being thus the representatives of money, they follow the nature of their principal. As therefore in the case of money, the property and the possession are, in the absence of fraud, inseparable; so, in the case of these instruments, a good title may, in the absence of fraud, be acquired, without reference to the title of the person from whom it is acquired;(e) and hence the right of a person accepting a pledge of such instruments from a factor or broker, to retain them against the principal.(f)

The legislature however has protected the principal by statute, against the sale, negotiation, transfer, or pledge by a broker or other agent, of any such instrument, in violation of good faith, and contrary to the object for which the same was intrusted to him.(g) But to this subject our attention will be more fully directed in its proper place.

Our law with reference to pledges by factors may now be considered to be very little, if at all, different from the laws of the commercial states of the continent on the same subject; and, it would appear, that both in our own and in other countries, this similarity has been produced by the operation of the same cause, namely, a desire to facilitate mercantile transactions. All the text writers on the laws of Holland, and the maritime states of Italy, in treating of this subject, adopt the rule of the civil law,—“that no one can transfer to another a better title than he himself possesses;”(h) thereby denying the power [ \*151 ] of a factor to pledge \*the property of his principal; and the same rule seems formerly to have been followed in

(y) *Leuchart v. Cowper*, 3 Scott, 521. 533, (36 E. C. L. R.)

(z) *Treutell v. Barandon*, 8 Taunt. 100, (4 E. C. L. R.); *Sigourney v. Lloyd*, 8 B. & C. 622, (15 E. C. L. R.); *Lloyd v. Sigourney*, (in error) 5 Bing. 525, (15 E. C. L. R.)

(a) *Goodman v. Harvey*, 4 A. & El. 870, (31 E. C. L. R.) In this case the court, to use their own words, “shook off the last remnant” of the doctrine that gross negligence and *mala fides* were the same thing. The former they considered might be evidence of the latter, but it could not be taken to be tantamount to it.

(b) This definition of the term *negotiable instrument*, has been adopted from a learned note by Mr. Smith to the case of *Müller v. Race*, 1 Leading Cases, 259, (Law Library.)

(c) *Wookey v. Pole*, 4 B. & Al. 1, (6 E. C. L. R.); *Brandao v. Barnett*, 2 Scott, N. R. 96. 112.

(d) *Gorgier v. Mievill*, 3 B. & C. 45, (10 E. C. L. R.)

(e) *Brandao v. Barnett*, *supra*.

(f) See the remarks of Holroyd, J., *Wookey v. Pole*, *supra*.

(g) 7 & 8 Geo. 4, c. 29, s. 49.

(h) See the authorities quoted in 1 Bell, Com. on Mer. Jur. 389.

France,<sup>(i)</sup> in Scotland,<sup>(k)</sup> and in America.<sup>(l)</sup> But although such was the strict rule of law in all these countries, still in them, as in our own, a relaxation of that rule has been adopted in favour of commerce; and at the present day the admitted principle on the continent and in Scotland is, that the possession of movable, or, in the language of our law, personal property, constitutes a sufficient title to enable the lawful possessor, whether he be a factor or not, not only to sell but to pledge such property;<sup>(m)</sup> whilst, in America, the law on this subject is regulated by enactments very similar in their provisions to those of the statute 6 Geo. 4, c. 94.<sup>(n)</sup>

## \*CHAPTER III.

[ \*152 ]

### ON THE RIGHTS AND LIABILITIES OF FACTORS AND BROKERS.

#### SECTION I.—RIGHTS.

##### PART I.

##### ON THEIR RIGHTS AGAINST THE PERSON OF THE PRINCIPAL.

FROM the performance of the duties and the exercise of the powers, which we have thus seen to be incumbent upon and to belong to factors and brokers, two consequences naturally follow,—to wit, the acquisition by them of certain rights, and the incurring of certain liabilities. Let us therefore in the first place direct our attention to the inquiry,—what are their rights, and how may they be enforced? and then let us consider the nature and extent of their liabilities.

And first of the rights of factors and brokers.

These have generally been divided into two classes: *first*; their rights as against their principals: and *secondly*; their rights as against third parties. The former of these classes again may be very properly subdivided as follows. The rights falling under it may, as will hereafter appear, be enforced either by action or set-off, or by lien; but it will likewise appear that, although this is the case, still these two kinds of remedies are by no means co-extensive. Thus we shall see, that whilst all factors and brokers,—except those who act under a commission *del credere*,—may avail themselves of the remedies by way of action and set-off in order to recover their advances, the remedy by way of lien belongs \*almost exclusively to fac- [ \*153 ] tors,—the only exception in favour of brokers being that allowed in the case of policy-brokers, who are considered, for the purpose of exercising this right, as *quasi* factors. We shall likewise see that there are circumstances under which the remedy by way of lien

(i) Pothier, *Trait. du Contrat de Nantissement*, § 27, Oeuv. Tom. 8, p. 164, edit. Dupin, Paris, 1825.

(k) 1 Stair, 7, § 4.

(l) 2 Kent, Com. on Amer. Law, 637.

(m) 1 Bell, Com. on Merc. Jur. 389—393.

(n) 2 Kent, Com. on Amer. Law, 638.

might be taken advantage of, when that by way of action or set off could not; and so, on the other hand, we shall see that a factor or broker may be deprived of his remedy by way of lien, without his being debarred from having recourse to that by way of action or set-off; and thus it will appear, that although the rights on which these remedies are founded are in their nature identical, yet that, when viewed with reference to such remedies, these rights admit of a very natural and just distinction. In order therefore the more readily to understand these rights, we propose to classify them with reference to the remedies by which they may be enforced; and we shall accordingly treat of them under the following heads:—

*First*; the rights of factors and brokers, as against the person of the principal:—and,

*Secondly*; their rights, as against the goods or funds of the principal, which may happen to be in their hands, or under their control.

First then; let us see what rights a factor or broker possesses, as against the person of his principal.

It may be remembered, that in defining the characters of factors and brokers it was stated,—that one feature common to both was, that they were agents employed to do certain work for a reward, usually called commission. It was likewise stated that this commission was either ordinary or *del credere*,—both of these consisting, in general, of a per-centage on the value of the work done; but the latter differing from the former in this,—that whereas the former was a mere compensation for the trouble taken by the factor or broker in performing [ \*154 ] his employment,—the latter included, \*in addition to this, a certain premium given by the principal to the factor or broker, in return for a guarantee by the latter of the solvency of the persons with whom he might deal on his principal's behalf. Thus it appeared, that under whatever terms the factor or broker was engaged, his right to a commission or reward for his services was, in a manner, inherent in the very nature of his employment; and such being the case it would seem to follow that, in treating of the rights of factors and brokers, the consideration of their right to commission has the first claim on our attention.

The right of a factor or broker to his commission is regulated in one of three ways;—either, first, by statute; or secondly, by special contract; or thirdly, by the usage of trade. The cases which come under the first of these heads apply, it is believed, almost exclusively to brokers properly so called; and the statutes by which they are affected in this respect, have been already enumerated.(a) All therefore that it appears necessary to add on this subject, is;—that, with reference to transactions under the statute 12 Anne, stat. 2, c. 16, s. 2, it has been held; that in order to render it illegal in a broker to take any greater commission than is prescribed by that statute for conducting any such transaction, it is not requisite that he should carry on the business to its completion; but that if he assist in so doing, that will be sufficient. Where therefore the plaintiffs, who were brokers, had been ordered to sell an estate or to raise money upon it, but, being unable to effect a sale, they applied to A., by negotiation with whom a loan

(a) See ante, pp. 5, 6.

was ultimately effected, but without any further interference on the part of the plaintiffs, it was held;—that they could not recover more than five shillings per cent. commission, for procuring this money.(b)

And in all probability the same would be followed in construing the other statutes having reference to this subject;—\*at least [ \*155 ] the remark made by one of the learned judges in the case just quoted, would seem equally to apply to all;—namely, that if the contrary principle were held to prevail, “the procurers of money at exorbitant rates would always stop short before the completion of the transaction, and so elude the provisions of the statute.”(c)

Where the factor or broker is retained under a special agreement in which the amount of commission to be received by him is specified, the parties would be bound by the agreement, and by it alone,—except of course in cases wherein such agreement is illegal in its terms. Accordingly where it was agreed between one T., a factor, and his principal, that T. was to have a commission on all sales effected or orders executed by him; that the principal was to be responsible for bad debts; and that T. was to draw his commission monthly; but it appeared that, by the custom of the trade, commission was not allowed on sales which produced bad debts;—it was held that, notwithstanding this, T. was intitled, under the terms of the agreement, to his commission on such debts.(d)

So where by agreement between the factor or broker and his principal it is stipulated, that the former shall be paid a certain commission, but the agent claims a further remuneration on account of extra attendances,—it will be for the jury to say, whether in giving such attendances the agent was merely performing a duty contemplated by the agreement; and if they find that this was the case, he will not be intitled to make any extra charge. This will appear from the following decision.

The plaintiff acted, under a written agreement, as the commission agent of the defendant, in the sale of goods manufactured by the latter,—the amount of his commission \*on such sales being [ \*156 ] specified by the agreement. The defendant was a contractor with the Admiralty for the supply of various articles, which articles were some of those on the sale whereof it was agreed that the plaintiff should be paid commission. It appeared moreover, that when any of these articles were wanted, the defendant had to send several patterns thereof to Somerset House for inspection, and that it was necessary for some one to attend there on behalf of the defendant whenever such inspection took place. It was further proved, that the plaintiff had attended at Somerset House, on this business, a great many times, and that the usual charge for the services of a competent person on such occasions, was from ten shillings to one guinea per day. The plaintiff had been paid his commission; and he now sought to recover his extra charge for the above attendances. It was contended for the defendant, that the plaintiff had no right to make any such charge, and the learned judge who tried the cause, directed the

(b) Pryce v. Wilkinson, 2 Bing. 470, (9 E. C. L. R.)

(c) Per Park, J., Pryce v. Wilkinson, 2 Bing. 474, (9 E. C. L. R.)

(d) Bower v. Jones, 8 Bing. 65, (91 E. C. L. R.)



jury as follows. "This action is brought to recover a compensation for the attendances of the plaintiff, made when he was agent for the defendant; and the question for you is, whether what the plaintiff did, was or was not done in the ordinary course of his business as an agent? . . . . If the plaintiff, in giving these attendances, was only acting in the discharge of his business as an agent, he is paid by his commission; but if these attendances were matter beyond his duty as an agent, he is intitled to be paid for them separately." (e) The jury, under this direction, found a verdict for the defendant.

If however there be no special contract, nor any statutory restriction, the allowance and custom of trade is the only medium, whereby to ascertain what is due to the factor or broker for his commission. (f) Thus, for example;—although a broker has, in general, no claim for [ \*157 ] commission \*except as against his employer, whether he be vendor or vendee, yet it appears, that where colonial produce is sold through the intervention of such an agent, he is intitled by the usage of trade in London,—if there be no express stipulation to the contrary, to one-half per cent. commission from the purchaser as well as from the seller. (g) So it appears that, by the usage of trade in London, a broker who acts as such in chartering a ship to the Baltic, is intitled to a commission of five per cent. on the amount of the freight; (h) and indeed it was found in a recent case by a London jury, that, according to the usage which was proved to prevail in that city, the broker's commission on freight is in all cases five per cent., unless there be a special agreement to the contrary, or the ship be chartered on a tender. (i)

Such are a few of the usages of trade on this subject, which have been recognized by our courts of law, and we shall have occasion hereafter to notice others which have received a similar sanction. At present however we shall merely remark, that,—as these usages are called in aid for the purpose of making up for the want of a special agreement between the parties, it is of course much to be desired that there should be a general definite rule, well known and well understood, which should govern every case where there is no such agreement; (k) and accordingly it has been held, that in order to intitle a factor or broker to claim the benefit of a usage of trade in regulating the amount of his commission, such usage must be proved to be not only valid in point of law, but to be also uniform in practice. Where therefore an action was brought against a broker, by the executors of a deceased underwriter, to recover the balance of an account alleged to be due to the estate of the testator; and the main question in the [ \*158 ] case was, whether the broker \*was intitled to an allowance of twelve per cent. on the settlement of his accounts with the underwriter, over and above his customary commission of five per cent., but there was conflicting evidence as to whether such was the usage of trade or not, Mr. Justice Dallas thus directed the jury. "The essence of usage is uniformity; but in the present case, different allowances have been made at different times, and the

(e) Per Rolfe, B., *Marshall v. Parsons*, 9 C. & P. 656, 658, (38 E. C. L. R.)

(f) Per Lord Ellenborough, *Roberts v. Jackson*, 2 Stark. 226, (3 E. C. L. R.)

(g) *Eicke v. Meyer*, 3 Camp. 412.

(h) *Cohen v. Paget*, 4 Camp. 96.

(i) *Browne v. Nairn*, 9 C. & P. 204, (38 E. C. L. R.)

(k) *Ibid.*; per Alderson, B.

demand is subject to exceptions arising out of circumstances. Now, if it were due of right, such circumstances would not prevail to exclude it. If it were demanded upon the usage of trade, surely an allowance of this magnitude, when refused by an underwriter, would have been compelled in a court of justice; but it appears to me that there is nothing amounting to legal usage on the subject. It comes to no more than a gratuity given by the underwriter as an inducement to the broker to bring good policies to him." The jury accordingly found a verdict for the plaintiffs, and stated that it was their unanimous opinion, that the allowance was a gratuity merely.(l)

Where there is no usage of trade, and no special agreement, the factor or broker will be intitled to whatever the jury may think to be a reasonable remuneration for his services;(m) but, as has been well observed by a learned judge, it is to be lamented that, in such cases, no special contract is made, as this would obviate all difficulty on the subject.(n)

If, either by the terms of the contract, or the usage of trade, the payment of the factor's or broker's commission is made to depend on a contingency, no right to recover such commission will accrue to him, until after the contingency shall have happened. Thus, where a broker chartered ships \*at a certain commission on their [ \*159 ] outward freight, and the like on their homeward freight, but the charter party made it contingent what the amount of that freight should be; it was held, that the broker could not sue for any sum till the contingency was determined.(o) But it appears, that if the amount of freight be settled, and the only contingency be as to the time at which the freight or part of it shall be paid, the broker will be intitled to his commission on the gross sum, whether such contingency shall have previously happened or not.(p)

Again: it appears that by the usage of the city of London, a ship-broker, who has procured a bargain for the hire of a vessel, is intitled to receive from the owner a certain commission on the amount of the freight, if the contract is perfected, but not otherwise; and accordingly it has been held,—that where a broker had negotiated the hire of a vessel, and a memorandum for a charter had been signed by both parties, but the bargain afterwards went off, and the ship was not employed, the broker could not maintain an action against the ship-owner to recover the commission, or even compensation for his work and labour.(q)

It seems moreover, that the same rule holds good even where the contract is broken off by the owner, without any default on the part of the broker.(r) This latter branch of the custom indeed would seem, at first sight, to be somewhat unreasonable; but it is explained by the fact, that the rate of payment in contracts of this kind which are brought to a conclusion, is higher than would be requisite as an equi-

(l) *Levi v. Barnes*, Holt, N. P. C. 412, 414, (3 E. C. L. R.)

(m) *Per Alderson, B.*, *Brown v. Nairne*, 9 C. & P. 205, (38 E. C. L. R.)

(n) *Per Lord Ellenborough*, *Roberts v. Jackson*, 2 Stark. 226, (3 E. C. L. R.)

(o) *Winter v. Mair*, 3 Taunt. 531.

(p) *Roberts v. Jackson*, 2 Stark. 225, (3 E. C. L. R.)

(q) *Read v. Rann*, 10 B. & C. 438, (21 E. C. L. R.)

(r) *Ibid.*; *Broad v. Thomas*, 7 Bing. 99, (20 E. C. L. R.)

valent for the trouble of conducting the particular transaction; and [ \*160 ] it is probably on that ground that the custom \*has arisen, to allow nothing where the contract is never completed.(s)

Where however a factor or broker acts under a commission *del credere*, his right to receive payment thereof will not, by this circumstance alone, be kept in abeyance until the event is determined by the insolvency of the person for whom he is guarantee; but, on the contrary, he will be intitled to be paid such commission immediately. In fact, his commission in such cases is due from the moment of his entering into the contract of guarantee; and *indebitatus assumpsit* will lie forthwith, for the recovery thereof from the principal.(t)

A distinction must likewise be made between cases in which a contract goes off on account of some disagreement between the parties, although the broker has done all that was required of him in order to complete it; and cases in which, after one broker has introduced the parties for the purpose of negotiating the contract, such contract is completed through the intervention of another. In the former case we have seen, that the broker will not be intitled to his commission; in the latter, however, he will. This is shown by the following decisions.

An action was brought to recover a certain sum, being the amount of commission claimed by the plaintiffs as brokers, on the sale of a ship called the Emerald, belonging to the defendant. On the part of the plaintiffs, it was proved by the purchaser, that some time previous to the transaction in question, he had met one of the plaintiffs on 'Change; that at that time he did not know the defendant; that he was, at the time mentioned, in want of a ship; that he was told by [ \*161 ] the plaintiffs that the defendant had one which they thought \*would suit him; and that, soon afterwards, the plaintiffs introduced him to the defendant,—in consequence of which introduction a negotiation was entered into between him and the defendant for the purchase of the Emerald. He likewise proved that he afterwards saw the defendant once, namely at the plaintiff's counting-house, on which occasion the subject of the purchase was discussed, and that the vessel was ultimately purchased by him for 2900*l*. On his cross-examination the witness stated;—that he had mentioned the subject to a Mr. A., with whom he had gone to the London Docks, and by whom the Emerald was first pointed out to him; but that he had first seen the defendant by appointment made by the plaintiffs; and that A., by his direction, had offered the defendant a certain sum for the ship, which was refused; that he did not authorize A. to make any further offer; that he ultimately agreed to purchase the ship of the defendant, but that the plaintiffs were not present either at the time of making this agreement, or at the execution of the bill of sale. He still admitted however, that before he saw the plaintiffs he did not know that the defendant was the owner of the Emerald. Several brokers were called in support of the plaintiff's claim,—the substance of whose testimony was; that where the broker introduces the cus-

(s) Per Tindal, C. J., *Broad v. Thomas*, *supra*.

(t) *Caruthers v. Graham*, 14 East, 578.

tomers, and the seller makes the agreement, they had always understood the commission to attach; and accordingly Tindal, C. J.,—who tried the cause,—in his address to the jury stated the law on the question to be as follows. “The only question for you to decide is, whether the sale really proceeded, in effect, from the act of the plaintiffs, acting as brokers,—whether it really and substantially proceeded from their act, though they did not complete the contract. If it did, they will be intitled to your verdict. Undoubtedly a dry introduction of one man to another will not be enough. But if the introduction is the foundation on which the negotiation proceeds, and without which it would not have proceeded, then the parties cannot, by their agreement, deprive the \*brokers of their just remuneration.” The jury accordingly found a verdict for the [ \*162 ] plaintiffs.(u)

And so in a subsequent case, in which the question was;—whether the plaintiff was intitled to commission for having found a freight for the ship W.,—he claiming such commission on the ground that he had, as broker, introduced the merchant to the ship-owner, although the charter had been afterwards made through another broker,—the custom was stated by Lord Abinger to have been proved to be as follows. “The rule,” said his Lordship, in summing up, “as stated by the plaintiff’s witnesses is this. When a broker has introduced the captain and merchant together, and they by his means enter into some negotiation as to the voyage, he is intitled to a commission if a charter-party be effected between them for that voyage, even though they may employ another broker to prepare the charter-party, or may write the charter-party themselves. The usage goes further;—that if a broker authorized by both parties, and acting as the agent of each, communicates to the merchant what the ship-owner charges, and also communicates to the ship-owner what the merchant will give, and he names the ship and the parties so as to identify the transaction, and a charter-party be ultimately effected for that voyage, the broker is intitled to commission; but if he does not mention the names, so as to identify the transaction, he does not get his commission, to the exclusion of another broker who afterwards introduces the parties personally to each other.”(x)

In the case just cited, the question turned principally on the latter branch of the above custom; and it was left to the jury to say whether it was not a reasonable qualification of that custom, that if the first broker did not name the parties or ship, he should not be entitled to claim his commission to \*the exclusion of another broker [ \*163 ] who afterwards did so. In support of this qualification it is observed, that, if the ship and parties were not named, the broker might change the ship and put in another, pending the negotiation; and, in conformity with this view of the case, the jury acquiesced in the reasonableness of such qualification, and found their verdict accordingly.

These cases, it will be observed, apply to brokers only; and it does not appear from the books, that any decisions similar to the above

(u) *Wilkinson v. Martin*, 8 C. & P. 1. 5, (34 E. C. L. R.)

(x) *Barnett v. Bouch*, 9 C. & P. 630, (36 E. C. L. R.)

have ever taken place with reference to the right of factors to their commission. Indeed, from the very nature of the employment of this class of agents, it is very unlikely that in their case, questions similar to those which have just been discussed would arise. The property respecting which they are employed to deal, or at least the insignia of such property, being always in their own hands, it is obvious that no third party could step in for the purpose of making a contract with reference to that property, so as to entitle him to dispute the factor's claim for his commission; and this being so, it follows, that such questions as those raised in the case of *Wilkinson v. Martin*, and *Burnett v. Bouch* can, with reference to factors, scarcely, if ever, occur. The same remark will apply to that class of questions which was settled by the cases of *Broad v. Thomas*,<sup>(y)</sup> and *Read v. Rann*.<sup>(z)</sup> In them it was decided, that a ship-broker was not entitled to his commission unless the charter-party was completed; and the only reason urged in support of the contrary doctrine was, that the broker, having done all that was incumbent on him to fix the bargain, ought to be remunerated for his trouble. But in the case of a factor this argument will not apply. Their commission it will be remembered, is, in general, a per-centage on the price of the article which they buy or sell. If, however, there be no actual sale or purchase, it is [ \*164 ] manifest that no \*price can be either given or received. There is therefore nothing on which the commission can attach; and it would seem to follow from this, that, so far as regards factors, the law as it relates to their right to commission may be stated thus;—that they must complete the thing required of them, before they can be entitled to charge for it.<sup>(a)</sup>

But still it is submitted that, in order to have this effect the completion of the contract must have been prevented by the act of the factor himself; for, there being no usage of trade to the contrary, it would be manifestly unjust to deprive the factor of his commission, merely because of the wilful act or neglect of his principal. It would indeed be allowing a man to take advantage of his own wrong.

The next topic which claims our attention under this branch of our subject, is the right of factors and brokers to be reimbursed all payments, advances, and expenses, incurred by them in the regular course of their employment. This right,—unlike that which we have just been discussing—they possess in common with simple mandataries; and notwithstanding the difference between these two kinds of agencies in respect of the former particular, their similarity in this would seem to be perfectly well founded. The simple mandatary, it is said, should be reimbursed his expenses, because it can never be presumed that a gratuitous trust is designed to be a burden on the person who undertakes it.<sup>(b)</sup> He neither bargains for nor receives any reward for the trouble to which he may be put in the execution of his office; and it is therefore just that he should, at least, be saved from incurring any positive loss thereby. Now the same reasoning will apply to the case of factors and brokers. They are, as we have

(y) *Ante*, p. 159.

(z) *Ibid*.

(a) *Per Best, C. J., Hamond v. Holiday*, 1 C. & P. 384, 386, (11 E. C. L. R.)

(b) *Story on Bail* 197.

seen, agents for hire; but still the hire they receive is intended as a compensation, not merely for their trouble, but likewise for the exercise of their skill. In the contract which they [ \*165 ] make with their principals the possession of this skill is implied,—a point in which their agency differs essentially from that of gratuitous mandataries;—they are moreover liable to their principals for the consequences of their want of such skill; and this being the case, it follows, that they are entitled to be rewarded for it, without their being exposed to the chance of having this reward diminished, by the deduction of any expenses which they may necessarily incur in the course of their employment; because, if this were not so, the burden in the one case would, in the event of such deduction being made, be as great as in the other; for, as the gratuitous mandatary would suffer by a positive outlay, so the paid agent would suffer by the diminution of his stipulated reward. Some such reasoning as this, in all probability led to the rule, which has been thus stated;—that wherever it is necessary for an agent in the regular course of his employment to make advances, the principal who deputed him in the business where they are necessary, must be taken to have requested him to make them, and is therefore bound to reimburse them.(c)

The most ordinary charges of this kind which a factor or broker is entitled to make, are those for premiums, warehouse-room,(d) duties, freight, general average, salvage, portage, and journeys.(e) He will also be entitled to charge for all payments made for the necessary preservation of the property committed to his care,(f) and in short, for whatever expenses he incurs in order to [ \*166 ] enable him to accomplish the objects of his commission.(g) A factor however will not be allowed to place anything to account under the head of general expenses;(h) and it is said that, if by making any improper charge he wrong his employer, he will have to answer for the same, not only for the amount of the principal money, but also for the interest thereof for the time.(i) So, on the other hand, it appears that if the factor, in his own wrong, has forgot to charge the merchant's account with payments made by him, the merchant will have, in like manner, to answer for it to the factor with interest for the time.(k) And it is said, that as between merchant and factor, if the factor has paid more than the merchant could have demanded of him, the latter will not be entitled to an account from the factor "till he has made even."(l)

We have mentioned the duties payable on goods, as one of those

(c) See Smith's Merc. Law, 91, (Law Lib.)

(d) The goods of a principal however, which are in the hands of his factor, are not liable to be distrained for warehouse rent due from the latter; *Gilman v. Elton*, 6 Moore, 243, (17 E. C. L. R.); nor where a factor to whom goods are consigned, having no warehouse of his own, deposited them in that of another, are they liable to be distrained for rent due from the warehouse-keeper. *Thompson v. Mashiter*, 1 Bing. 283, (8 E. C. L. R.); *Matthias v. Memard*, 2 C. & P. 358, (13 E. C. L. R.)

(e) *Story Com. on Agency*, 335; 2 *Chitty on Com. & Man.* 222.

(f) 1 *Roll. Ab.* 124, pl. 7.

(g) *Story on Agency*, supra.

(h) *E. I. Company v. Lake*, *Finch*. 117, *Vin. Ab. Factor*, B. 2.

(i) *Mal. Lex Merc.* 83.

(k) *Mal. Lex Merc.* 83; *Vin. Ab. Factor*, B. 3.

(l) *Fashion v. Atwood*, 2 *Ch. Ca.* 38, *in notis*.

disbursements which a factor is impliedly authorized to make, and with which he has therefore a right to charge his principal. It has however been held, that the factor shall have the benefit of customs saved, and not the merchant who employed him, provided only they be due to a foreign power; and consequently, that although the factor evade the payment of such customs, he will nevertheless be entitled to charge his principal with them.(m) But it is submitted, that this doctrine is not tenable. The reasons on which it was founded were stated in the following case.

A factor of the East India Company had carried over a large sum [ \*167 ] in gold to India, where a custom was due for it, \*which he never paid; and it was held by Holt, C. J., that the factor should have the benefit, and not the company, because it was due from them, and ought to have been paid; they therefore could not make title to it against one who had the possession,—for that was sufficient in all cases but against him who had the very right; and moreover the non-payment was at the peril of the factor.(n)

Now, however technically correct the former part of this argument may be, it is still difficult to see how the factor could support a claim for money paid for the use of his principal, unless he were in a situation to prove that he had in fact paid such money, or done something equivalent to it;(o) and, with reference to the non-payment having been at the peril of the factor, it would seem to be sufficient to answer, in the words of Lord Keeper North, that the factor had, in evading the payment, ventured his master's goods, as well as his own life;(p) and that therefore, to give him the benefit of such venture, would be to allow him to profit by a breach of duty. But this doctrine is objectionable even on broader grounds than these. A distinction, we have seen, is made between the evasion of home and foreign customs, the factor being allowed the benefit of his evasion in the latter case, but not in the former; and the reason of this distinction appears to have been, that the non-payment of home customs was a fraud on the King.(q) In another report of the same case however, it is stated to have been decreed against the factor on the general ground of fraud;(r) and this seems to be the only ground on which such a question could be fairly decided. Such then being the case, it may well be asked, in the words of an old writer, why should it not be [ \*168 ] \*deemed a fraud to cheat a foreign state of its customs? "Fraud," says he, "is always the same, though an allowance in one case may be more prejudicial than another, and surely a court of justice should not connive at any thing so detrimental to good faith, commerce, and reciprocal assurance."(s) For these reasons it is conceived that, at the present day, the above doctrine would not be maintained.

It has however been decided, that an insurance broker may charge his principal with premiums, whether he have in fact paid them or

(m) *Smith v. Oxenden*, Ch. Ca. 25; *Knipe v. Jenson*, ib. 76; *Vanderveldy v. Barry*, Vin. Ab. Factor, B. 6, Anon. 3 Salk. 235.

(n) Anon. 3 Salk. 235.

(o) *Maxwell v. Jameson*, 2 B. & Al. 51; *Taylor v. Higgins*, 3 East, 169.

(p) Anon. Skin. 149.

(q) *Borr v. Vandall*, Ch. Ca. 30.

(r) *N. Ch. R.* 87; Vin. Ab. Factor, B. 6.

(s) See the remarks on the above maxim, 1 Eq. Ab. 369, in notis.

not. The reason of this is, that by the usage of trade the broker gives the underwriter credit in account for the premium when the policy is effected, and the underwriter by the terms of the policy acknowledges the receipt of the premium from the assured;—which circumstances are, as between the broker and his principal, considered to be equivalent to actual payment.<sup>(t)</sup> The same rule holds when the policy is under *sen*, and the broker merely covenants with the underwriter to pay him the premium. But it appears that, under such circumstances, the broker could not recover on the common count, as for money paid for the use of his principal.<sup>(u)</sup>

It will be remembered that the right of a factor or broker to be repaid his advances was stated with this qualification, namely,—that such advances were made in the regular course of his employment. There are however some exceptions to this rule, of which the following are examples. If, for instance, circumstances of emergency occur, in which, to use the language of Dr. Paley, “he has reason to believe that his employer, if he were present, would alter his intentions,”<sup>(x)</sup> and authorize a departure from the usual course, \*the [ \*169 ] factor or broker will, it seems, be entitled to charge his principal with the outlay thereby occasioned. Thus it has been said, that if, on account of the lateness of the season, or for any other sufficient cause, a factor were, although without instructions, to effect an insurance on the goods of his employer, the latter would be liable to pay the premiums;<sup>(y)</sup> and in like manner, where it appeared that a factor had a general authority to receive and sell goods, and out of the proceeds to repay himself his advances, charges, and commission, it was held;—that the costs of an action against a wrong-doer who withheld the possession of the goods, and also the costs of a reference *bona fide* incurred for the recovery of the goods, were legal charges thereon, and might be set off by the factor in an action brought against him by his principal to recover the proceeds of the sale.<sup>(z)</sup> In cases like these, the agent’s right to recover his disbursements depends on the rule,—that where from the occurrence of exigencies not provided for by the regular rules of business he is obliged, although acting for the best, to incur increased expenditure in the execution of his agency, it may reasonably be inferred that such expenditure was incurred by the authority of his principal.<sup>(a)</sup>

So if by the custom of trade,—as for example by the usage of the Stock Exchange,—a broker be obliged, without any default on his own part, to pay moneys on account of a contract into which he has entered for his principal, the latter must repay the same, and that whether he was acquainted with the usage by which the broker was governed or not.<sup>(b)</sup> Cases like these, indeed, seem hardly to come within the exceptions of which we are now treating; because, what-

(t) Per Parke, J., *Power v. Butcher*, 10 B. & C. 329. 347, (21 E. C. L. R.)

(u) *Power v. Butcher*, *supra*.

(x) *Mor. & Pol. Phil. B. 3, c. 12.*

(y) Per Buller, J., *Wolff v. Horncastle*, 1 Bos. & Pul. 321.

(z) *Curtis v. Barclay*, 5 B. & C. 141, (11 E. C. L. R.)

(a) 1 Bro. 323; 3 Chitty on Com. and Man. 222.

(b) *Young v. Cole*, 4 Scott, 489, (36 E. C. L. R.); *Sutton v. Tatham*, 10 A. & El. 27, (37 E. C. L. R.), overruling *Child v. Morley*, 8 T. R. 610.



[ \*170 ] ever be the circumstances under which such \*payments are made, still, from the fact of their being made in compliance with the usage of trade, they may very properly be considered as payments made in the regular course of business.

But a factor or broker is not entitled to charge his principal with any payment, or advance, which he makes voluntarily, and in his own wrong. Thus if a factor, without commission, pay money for a merchant to another man, it is said to be at his peril to answer for it.(c) So, where the defendant as broker for B. purchased the goods of A.,—for whom he also acted as broker under a commission *del credere*,—and afterwards resold the goods for B. and paid A. the price; it was held, in an action brought to recover the balance due on such resale;—that the defendant was not entitled to set off the payment made to A., and that the fact of his having had a commission *del credere* from A. made no difference.(d) And in like manner, where a broker who was employed to sell goods, found, on applying for the delivery of them, that they were stopped for freight, which freight he paid in order to obtain possession of the goods, although his principal had formerly directed him not to do so, alleging that the freight had been paid already, it was held;—that this advance was made by the broker in his own wrong,—though the freight had not been paid as the principal supposed,—and that therefore, the latter was not liable for it.(e)

It is likewise an incontestible principle in our law that where a party orders his agent to pay money to a third person, but afterwards, before the money is paid or passed in account, countermands such [ \*171 ] order, the agent, paying after \*such countermand, must be deemed to have made the payment wrongfully and without authority.(f) If therefore a factor or broker make a payment under such circumstances, he will not be entitled to charge the same in account against his principal: and, in like manner, if he make such a payment after notice of an act of bankruptcy committed by his principal, he will be held to have done so in his own wrong.(g)

It should however be borne in mind, that orders for the payment of money by an agent are not always revocable. Thus, if the order have been executed either by the actual delivery of the money by the agent to the person for whom it was intended, or by some binding engagement having been entered into between the agent and such person, which would give the latter a right of action against the former, such order is no longer revocable, and the agent may therefore pay the money, even after notice not to do so.(h) And where a trader, before any act of bankruptcy, directed his broker, who had authority to receive certain moneys due to him, to pay a sum to B. in satisfaction of a debt, and the broker *bonâ fide* agreed with B. to

(c) *Mal. Lex Merc.* 83.

(d) *Morris v. Cleasby*, 4 M. & Sel. 566; and see *Gurney v. Sharpe*, 4 Taunt. 242.

(e) *Howard v. Tucker*, 1 B. & Ad. 712, (20 E. C. L. R.)

(f) *Per Pell, Serjt.*, arguendo; *Fisher v. Miller*, 1 Bing. 153, (8 E. C. L. R.)

(g) *Vernon v. Hankey*, 2 T. R. 113; *Green v. White*, 3 Scott, 367, (36 E. C. L. R.)

(h) *Per Park, B.*, *Brind v. Hampshire*, 1 M. & W. 365. 372; (\*) and see *Williams v. Everett*, 14 East, 596; *Scott v. Forcher*, 3 Meriv. 652.

pay him so soon as he received the money, after which the trader became bankrupt: it was held that his assignees could not recover this sum from the broker, although he had not in fact paid it to B. until after the commission issued.<sup>(i)</sup> Nor is an order to an agent to pay over money revocable, if it be given in the first instance on a sufficient consideration;<sup>(k)</sup> and if the circumstances of the case amount, as between the principal \*and the person to whom the money is ordered to be paid, to an actual appropriation [ \*172 ] thereof by the former to the latter, the agent will be justified in making the payment even after having had orders to the contrary.<sup>(l)</sup> In cases like these therefore, the factor or broker will be entitled to be reimbursed by his principal, under the ordinary rule.

There are perhaps few questions which have been more frequently disputed, than the right of parties to recover interest on moneys claimed by them from a debtor; but the general rule seems now to be, that interest is payable only where it is given by the express terms of a contract; or by an engagement implied from the nature of the security,—as in the case of bills of exchange; or by the usage of trade to which the contract has relation.<sup>(m)</sup> If therefore a factor or broker can support his claim on any of these grounds, he will be entitled not only to be repaid his advances, but likewise to receive interest thereon;<sup>(n)</sup> and in one case, in which it appeared that the plaintiff, a broker, had delivered an account to the defendant annually, charging interest at the end of each year, and at each rest adding the interest of the former year to the principal, and that this mode of rendering the accounts had continued for some years without any objection on the part of the defendant:—Lord Ellenborough held, that it was fair and reasonable that the defendant should pay interest in the manner charged.<sup>(o)</sup>

Where however the claim is submitted to a jury, the factor or broker may entitle himself to interest on his advances, even in the absence of any express or implied contract to \*that effect. [ \*173 ] This right he possesses under the statute 3 & 4 W. 4, c. [ \*173 ] 42, s. 28, whereby it is enacted:—that upon all debts or sums certain, the jury, on the trial of any issue or inquisition of damages, may, if they think fit, allow interest for the creditor, at a rate not exceeding the current rate of interest, from the time when such debts or sums certain were payable, provided the same were payable by virtue of some written instrument at a certain time; or if payable otherwise, then from the time when a demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the time of payment.

What has been said with reference to the right of a factor or broker to be reimbursed his advances applies, of course, to those cases only

(i) *Bedford v. Perkins*, cited in *Green v. White*, 3 Scott, 390, (36 E. C. L. R.)

(k) *Per Tenterden, C. J., Metcalfe v. Clough*, 2 M. & Ry. 178, 179, (17 E. C. L. R.)

(l) *Fisher v. Miller*, 1 Bing. 150, (8 E. C. L. R.); and see *Gibson v. Minet*, 2 Bing. 7, (9 E. C. L. R.)

(m) *Per Tindal, C. J., Fruhling v. Schroder*, 2 Scott, 135, 144, (30 E. C. L. R.); per *Abbott, C. J., Higgins v. Stewart*, 2 B. & C. 348, 349, (9 E. C. L. R.)

(n) *Blackburn v. Kymer*, 5 Taunt. 584, (1 E. C. L. R.) *Bruce v. Hunter*, 3 Camp. 467.

(o) *Bruce v. Hunter*, *supra*.

in which that right is not regulated by special agreement with the principal; and it seems hardly necessary to add, that where such an agreement has been entered into between the parties touching this right, the law will hold it to be limited or enlarged entirely according to the terms on which they have so agreed. It need therefore be only remarked further, with reference to this subject, that it seems that such agreements will be construed by the courts with considerable liberality towards the agent; and accordingly, where it appeared that the plaintiff had engaged to effect for the defendant an insurance on certain goods, with such names as should be to the defendant's satisfaction;—it was held, in an action brought by the agent to recover the premium, that,—the voyage having been performed, and the defendant never having required to see the names on the policy,—he could not resist the agent's claim by objecting that they had never been exhibited to him for his approval.(p) And in like manner, where it appeared that J. and Co. had been indebted to the defendant, who [ \*174 ] was their broker; that whilst they were so indebted, it had been \*agreed between them,—“that, in consideration that J. and Co. would employ the defendant as broker to sell certain timber on commission, and would indorse and deliver the bills of lading of such timber to him, he, the defendant, undertook to account for and pay over the proceeds of the sale without deducting therefrom the sums of money so due to him as aforesaid,”—and it further appeared that J. and Co. afterwards became bankrupt; it was held, in an action brought by the assignees of J. and Co. to recover the proceeds of the timber, that the above agreement was not binding on the broker, so as to deprive him of the right to set off the amount of the debt due to him from J. and Co., against the claim of the assignees for such proceeds.(q)

Lastly; a factor or broker is entitled to charge his principal with all damages sustained by him in the execution of his mandate, unless they have been incurred by his own default. This is according to rule of the civil law,—*officium nemini debet esse damnosum.*(r) Where, therefore, the principal sent his factor abroad, and commissioned him to draw on a foreign merchant, which he did, and so stated in the account which he furnished to his principal; and the principal gave credit for the bills drawn, as for cash, but, by his contrivance, they were never accepted;—it was held, that the factor should not be concluded by his account but be paid.(s)

It will be observed, however, that in the case just cited, the factor himself was the only party who sustained any injury from the conduct of his employer; and hence it follows that, but for the question arising on the account furnished by the factor, no doubt could have been entertained as to his right to be indemnified for the fraud which had been [ \*175 ] practised upon him. But this rule, with reference to the \*right of a factor or broker to be saved harmless against all damages sustained by him in the execution of his office, has been

(p) *Dixon v. Hovill*, 4 Bing. 665, (15 E. C. L. R.)

(q) *McGillivray v. Simson*, 9 D. & Ry. 35, (22 E. C. L. R.)

(r) *Inst. Lib.* 56, § 4.

(s) *Warr v. Prasad, Colles*, P. C. 57.

carried still further, and is now held to apply to many cases in which the agent, by obeying the orders of his principal, injures the rights of third parties, as well as to those in which he himself is the only sufferer. Let us briefly trace the steps by which our courts have come to entertain this doctrine.

It is a well known maxim in our law,—that there is no contribution amongst wrong-doers; and it was long since decided, that where, from the nature of his office, an agent must be taken to have been conscious that he was acting against law, even an express promise to indemnify him was void.<sup>(t)</sup> But at a very early period a distinction was made between the case of an agent who was commanded to do what was manifestly illegal, and that of one who was commanded to do an act legal in itself, although his principal might have, unknown to him, no authority to commission him to do it; and, in accordance with this distinction it was held, that where a person had been induced, ignorantly, to commit an illegal act, an express promise to indemnify him from the consequences thereof was valid.<sup>(u)</sup> Still however it remained to be decided, whether, in such a case as the above, the law would, in the absence of an express promise to that effect, imply an undertaking on the part of the principal to indemnify his agent; and although Lord Kenyon on one occasion seemed to favour the opinion that the law would imply such an undertaking,<sup>(x)</sup> still the only judge before whom, for a long period, the question appears to have arisen directly, held quite the contrary.<sup>(y)</sup>

\*At length the point was raised before the Court of [ \*176 ] Common Pleas; and that court, after taking time to consider, solemnly decided in favour of the right of the agent in such cases to an indemnity. "By the principles which regulate all laws of principal and agent," it was said, "every man who employs another to do an act which the employer appears to have a right to authorize him to do, undertakes to indemnify him for all such acts as would be lawful if the employer had the authority he pretends to have . . . . Brokers, factors, and agents, do not take regular indemnities;" and "these would be indeed surprised if, having sold goods for a man and paid him the proceeds, and having afterwards suffered in an action at the suit of the true owners, they were to find themselves wrong-doers, and could not recover compensation from him who induced them to do the wrong."<sup>(z)</sup> The same doctrine has since been laid down by the Court of Queen's Bench,<sup>(a)</sup> and again by the Court of Common Pleas in a recent case: and accordingly it may now be stated as clear law,—that where an act has been done by a factor or broker under the express directions of his principal, which act has occasioned an injury to the rights of third persons, the principal shall be bound to indemnify the factor or broker against the consequences thereof, provided the act done was not manifestly illegal in itself, but was done

(t) *Martin v. Blythman*, Yelv. 197.

(u) *Fletcher v. Harcot*, Hutton, 55; reported as *Battersey's case*, Winch. 48.

(x) See *Merryweather v. Nixan*, 8 T. R. 186.

(y) Per *Ellenborough, C. J.*, *Farebrother v. Analey*, 1 Camp. 343. 345; *Wilson v. Milner*, 2 Camp. 452.

(z) *Adameon v. Jarvis*, 4 Bing. 66. 72, (13 E. C. L. R.)

(a) *Betts v. Gibbins*, 2 Ad. & E. 57, (29 E. C. L. R.)

honestly and *bonâ fide*, in compliance with the directions of the principal.(b)

Having thus treated of the right of factors and brokers to their commission and advances, and having likewise seen under what circumstances they may be deprived of this right by the usages of trade, or by their own agreement, let us now consider those cases in which they are debarred the exercise thereof by operation of law.

[ \*177 ] \*It has been said to be perfectly settled, that where the contract which a party seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect ;(c) and it has accordingly been held, that if a factor or broker engages, in that capacity, in an illegal transaction, he will not be allowed to recover from his employer, either his commission or the advances or payments which he may have made in order to carry his instructions into effect. Thus, where in *assumpsit* by a broker for work and labour, and for money expended in the purchase of shares in a concern called the "Equitable Loan Bank Company" it appeared, that that company was illegal within the operation of the 6 Geo. 1, c. 18, as having transferable shares, and affecting to act as a body corporate without authority by charter or act of parliament ;—it was held, that the plaintiff

[ \*178 ] could not recover, inasmuch as his claim arose out of an illegal transaction.(d) So where a bill had been indorsed to a broker in consideration of money paid by him in effecting certain insurances, one of which was illegal, and the acceptor afterwards became bankrupt ;—the petition of the indorsee, to prove, was dismissed as to what arose upon the illegal insurance ;(e) and in a court of law, a bill given under such circumstances would be held to be altogether void : for, although it is a maxim in equity, that when the consideration consists of two parts, one bad, and the other good, the bill shall stand as to what is good,(f)—the rule of law is, that if either part of the consideration is shown to be illegal, the whole will be vitiated.(g) In like manner it is held, that where money has been paid by a broker

(b) See per Tindal, C. J., *Toplis v. Grane*, 7 Scott, 620. 643 ; and see *Johnston v. Usborne*, 11 Ad. & E. 549, (39 E. C. L. R.)

(c) Per Parke, B., *Cope v. Rowlands*, 2 M. & W. 149. 157 ;(\*) and see *dictum* of Tindal, C. J., *Gas Light Company v. Turner*, 7 Scott, 793. It will at once be seen that the principle laid down in the text includes every act which the law says a man ought not to do,—whether it be prohibited as being against good morals, or as militating against the interests of the state ; and that it therefore applies to acts which are *mala prohibita*, as well as to those which are *mala in se*. Indeed it is somewhat surprising that our courts should have ever entertained such a distinction as that which was introduced by the use of the above terms, inasmuch as it appears to confound the nature of the acts forbidden, with the act of the law in forbidding them,—all illegal acts being, in the latter view of the case, *mala prohibita*, whether in the former they are *mala in se* or not. The distinction however is now quite repudiated. See per Heath, J., and Rooke, J., *Aubert v. Maiza*, 2 Bos. & Pul. 374, 375 ; per Abbott, C. J., *Cannan v. Bryce*, 3 B. & Al. 183, (5 E. C. L. R.) ; and per Best, J., *Bensley v. Bignold*, 5 B. & Al. 341, (7 E. C. L. R.) Lord Mansfield seems to have been the first to introduce it in connection with our present subject ; see *Fuikney v. Reynous*, 4 Burr. 2072 ; but from the subsequent case of *Holman v. Johnson*, Cowp. 341, it would appear that latterly it was not recognized by that learned judge. His words in that case are, "no court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act."

(d) *Josephs v. Pebrer*, 3 B. & C. 639, (10 E. C. L. R.)

(e) *Exparte Mather*, 3 Ves. Jr. 373.

(g) Per Tindal, C. J., *Waite v. Jones*, 1 Scott, 730. 735.

(f) *Ibid.* 374.

in order to settle illegal stock-jobbing transactions, such money cannot be recovered back.(h) So it was said by Lord Loughborough, that if a man be employed to buy smuggled goods, and he pays for the goods, and they come to the hands of the person who employed him, that person shall not pay for them.(i)

But it seems that if a factor residing abroad should, in pursuance of a commission from this country, purchase and ship goods which at the time of the delivery he knew were intended to be smuggled into England, he would nevertheless be intitled to recover his commission and advances in respect thereof.(k) The reason of this seems to be, that the \*subject of a foreign country is not bound to pay allegiance or respect to the revenue laws of this; and that [ \*179 ] although when he comes within the act of breaking them himself, he cannot recover here the fruits of the illegal act, still the mere fact of his knowing that the goods he sells are to be disposed of in contravention of the fiscal laws of this country, is not to be considered as a breach of those laws.(l) If however the contract, so far as the factor is concerned, be not completed abroad; as if he agree to deliver the goods in England, or if he take an actual part in the illegal adventure,—as by packing the goods in prohibited parcels, or otherwise,—he will not be intitled to recover;(m) because, by undertaking to deliver the goods in that manner, knowing the use to be made of them, he offends against the laws of this country in the very contract itself.(n)

It has also been recently decided that a broker, acting as such within the city of London, cannot maintain an action for his commission on the purchase or sale of stock, unless he have been duly licensed by the mayor and aldermen of that city, pursuant to the statute 6 Anne, c. 16.(o) But a distinction is to be observed between cases which involve a breach of the above statute, and those in which the broker is merely guilty of a contravention of the regulations under \*which [ \*180 ] he was admitted by the court of mayor and aldermen to act as a broker within the city of London,—inasmuch as the prohibition to act without admission is statutory, whereas, the regulations adopted in the case of admitted brokers are purely municipal, and have not the force of general law,—the only consequences of their

(h) *Steers v. Lashley*, 6 T. R. 61; *Brown v. Turner*, 7 T. R. 631. Time bargains in foreign funds however are not within the prohibition of the stock-jobbing act, 7 Geo. 2, c. 28, nor are they illegal at common law, and therefore the above decisions do not apply to them; *Wells v. Porter*, 3 Scott, 141, (36 E. C. L. R.); *Oakley v. Rigby*, *ibid.* 194; *Elsworth v. Cole*, 2 M. & W. 31.(\*)

(i) *Ex parte Mather*, *supra*.

(k) See per Lord Mansfield, *Holman v. Johnson*, Cowp. 344; *Pellecat v. Angell*, 2 C. M. & R. 311.(\*)

(l) See per Abinger, C. B., *Pellecat v. Angell*, *supra*.

(m) See *Holman v. Johnson*, *supra*; *Pellecat v. Angell*, *supra*; *Waymell v. Reed*, 5 T. R. 599.

(n) Per Buller, J., *Waymell v. Reed*, *supra*, 600. The rule is thus stated by the Scottish lawyers. "When a merchant, settled abroad, whether a foreigner or a native of this country, simply sells goods to a smuggler *tanquam quilibet*, and makes a delivery on the spot, he can maintain an action for them in our courts, though he should have suspected or even known they were to be smuggled into Britain; but if he is accessory to the smuggling, and thereby to an infringement of the laws of this land, which he is bound to know as far as concerns his trade, he cannot demand the aid of the British courts for the recovery of his debt." *Morrison's Dict. of Decisions in the Court of Session*, 9554.

(o) *Cope v. Rowlands*, 2 M. & W. 149.(\*)

violation being those which the regulations themselves prescribe. Where therefore it appeared that a broker had entered into a contract in violation of these regulations, and of the bond given by him to the mayor, aldermen, and commonalty on his admission, he was held not to be disqualified from suing on such contract ;(p) and so it has been decided that a broker may prove for a debt arising out of transactions as a merchant, although such transactions are in contravention of the said regulations, and in direct violation of his bond.(q) The contract in such a case is not *ipso facto* void ; and consequently the only remedy against the broker is an action for the penalty of the bond, in breach of which such contract was made.(r)

An opinion seems at one time to have been entertained, that where the claim sought to be enforced had arisen out of a transaction involving the violation of an act of parliament which had for its object, not the protection of the public, but that of the revenue only, the person seeking to enforce such claim would not in the latter case, as in the former, be debarred from the exercise of this right ;(s) and accordingly, where it appeared that a factor had sold a parcel of prize manufactured tobacco, without having entered himself at the excise-office as a dealer in that article, or having any license as such, he was still [ \*181 ] held intitled to recover, because this was the breach of a mere revenue regulation, which was \*protected by a specific penalty.(t) A careful examination of the cases however by which this doctrine was supposed to be established will show, that they did not properly involve the question at all, so that, to reject that doctrine would not be to impugn the authority of those cases, reference being had to the particular facts of each ;(u) and in addition to this we have now the declared opinion of the Court of Exchequer to the effect ;— that it may be safely laid down, notwithstanding some *dicta* apparently to the contrary, that if *the contract* be rendered illegal, it can make no difference in point of law, whether the statute which makes it so has in view the protection of the revenue, or any other object.(x)

It appears however to be doubted whether, if a contract be merely void at common law, the agent through whom it was made will be prevented by that circumstance from recovering a compensation for his work and labour in respect thereof. This question arose in a case in which it was argued, that time-bargains in the foreign funds were prohibited by the stock jobbing act, and were therefore illegal ; or that, at least, they were mere gambling speculations, and were therefore void at common law ; and for these reasons it was contended, that the broker who had negotiated these bargains was not intitled to recover his commission in respect thereof. But the court were clearly in favour of the plaintiff on the former point ; and with reference to the latter they were of opinion, that it would be too much to say, that an action for work and labour could not be maintained in respect of work

(p) *Kemble v. Atkins*, Holt, N. P. C. 427, (3 E. C. L. R.)

(q) *Exparte Dyster*, 2 Rose, 349.

(r) *Kemble v. Atkins*, *supra*.

(s) See per Tenterden, C. J., *Brown v. Duncan*, 10 B. & C. 93. 99, (21 E. C. L. R.)

(t) *Johnson v. Hudson*, 11 East, 180.

(u) See observations of Littledale, J., *Forster v. Taylor*, 5 B. & Ad. 898. 900, (27 E. C. L. R.)

(x) See judgment of the Court in *Cope v. Rowlands*, 2 M. & W. 157.(\*)

done by a broker or agent, in the making of a contract which was not illegal, but at the most void.(y)

\*At all events it is clear, that where the claim of a factor or broker for his commission and advances is sought [ \*182 ] to be defeated on the ground of the illegality of the contract in respect of which he makes such claim, it must be shown that the contract itself was of such a nature as that it could not have been legally performed; for if it appear that the contract, although it did contemplate the doing of an illegal act, could nevertheless have been legally performed by the adoption by the parties of certain subsequent proceedings, the agent will in that case be intitled to recover a compensation for his trouble in making such contract. Where therefore the defence was, that the charter-party procured by the broker was such, that if the charterer failed to obtain certain licenses the voyage would be illegal, it was held, that this was no answer to an action by the broker for his commission.(z) And so it would appear, that if the consideration and the matter to be performed are both legal, the factor or broker will not be precluded from recovering his commission, merely because, in the performance of something to be done on his part, he has been guilty of an infringement of the law, which was not contemplated by the contract.(a)

In cases such as those stated above, the application of the rule which we have been endeavouring to illustrate is comparatively easy. In them all, the factor or broker was shewn to have been actually engaged in furthering an illegal transaction, or in other words, in breaking the law; and, this point having been made out, it followed as a natural consequence, that the law would not assist him in asserting any claim which arose out of a transaction of that nature. But circumstances may occur which would render it very difficult thus to apply the rule. Suppose, for instance, that the \*agent had no concern in [ \*183 ] the original scheme by which his principal proposed to break the law; but that at a subsequent period he engaged to do some act collateral to and remotely connected with it, and that from the doing of that act a claim arose which he sought to enforce against his principal,—in such a case as this, how and to what extent, according to the above rule, would the right of the factor or broker, on this new contract, be affected by the illegality of the original scheme?

It does not appear that the above question has ever become the subject of an express decision by our courts. Dr. Story however lays it down, on the authority of a case decided in the Supreme Court of the United States,(b) that the law in that country is to the following effect, namely;—"that an agent who has made advances to pay the duties due to the government upon goods which have been previously, by a collusive capture, fraudulently introduced into the country by the principal, but in which transaction the agent had no part or co-operation, may recover such advances;"(c) and as it is not improbable that a case involving similar principles may at some future time be brought

(y) Per Tindal, C. J., *Wells v. Porter*, 3 Scott, 141. 151, (36 E. C. L. R.)

(z) *Haines v. Busk*, 5 Taunt. 521, (1 E. C. L. R.)

(a) See the dictum of Tenterden, C. J., *Wetherell v. Jones*, 3 B. & Ad. 221. 226, (22 E. C. L. R.)

(b) *Armstrong v. Toler*, 11 Wheat. 258.

(c) *Law of Agency*, § 347.



before the courts of this country, it may perhaps be interesting to inquire, how far the grounds of the above decision are consistent with the present state of the law amongst us.

The reason of the above doctrine is thus stated by Dr. Story. "The new contract," says he, "is one degree removed from the original illegal transaction; and as it is perfectly legal in its consideration and formation as an independent contract, it ought not to be tainted by the illegality of the original transaction, although, at the time, the agent [ \*184 ] had knowledge of it." (d) Now it may be at once admitted, that if, in the case supposed, the factor or broker could show that the engagement into which he had entered was "in itself perfectly legal in its consideration and formation, as an independent contract," there would be no objection to his enforcing any claim arising therefrom. But supposing that goods were fraudulently introduced into this country by the principal, and that the agent, although he had had no part or co-operation in that transaction, yet knew that they had been so fraudulently introduced, but nevertheless engaged to pay, and did pay the duties due to government thereon, it seems very doubtful whether our courts would consider that this was a contract "perfectly legal in its consideration and formation." Indeed the authorities would seem to lead to the contrary opinion. There can be no question that a participation in carrying an illegal purpose into effect vitiates every contract, whether primary or secondary, of which it constitutes the object; (c) and it has been said, that knowledge affords a strong ground to infer participation in the whole transaction. (d) If then this *dictum* be law, the presumption would seem to be, that the doctrine laid down in America on the point now under discussion, would not be coincided in by the courts in this country; and that that *dictum* is law, will, it is submitted, appear from the following case.

One A. engaged in an illegal stock-jobbing transaction, by which he sustained a heavy loss; but it was expressly found, that the defendant was not a partner in such transaction. A. was unable to pay the loss, and, for the express purpose of enabling him so to do, the defendant lent him a sum of money, which sum of money was applied for that purpose. To secure the money so lent, A. assigned several cargoes to the defendant,—after which he became bankrupt. Subsequently [ \*185 ] to this, the defendant received certain sums of money on account of the proceeds of these cargoes, and this action having been brought by the assignees of A. to recover the same, as money had and received to their use, the plaintiff had a verdict, which was afterwards confirmed by the court,—on the ground, that the loan was illegal, and the securities void. The statute, it was said, absolutely prohibited the payment of money for compounding differences; and if it were unlawful in one man to pay, how could it be lawful for another to furnish him with the means of payment,—especially in a case wherein the means were furnished with a full knowledge of the object to which they were to be applied, and for the express purpose of accomplishing that object. (e)

(d) Law of Agency, § 347.

(e) 2 Pothier on Obligations, by Evans, 8, in *notis*.

(d) Per Eyre, C. J., *Lightfoot v. Tenant*, 1 Bos. & Pul. 551. 557.

(e) *Cannan v. Bryce*, 3 B. & Al. 179. 185, (5 E. C. L. R.)

Here then, the party who lent the money had had no connection whatever with the illegal stock-jobbing transactions; and had he not known that they had taken place, the mere fact of the money he lent having been applied to the purposes connected with them, would not have tainted him with their illegality. But because he was aware of the purpose to which the money was to be put, he was held to have done an illegal act, inasmuch as he had knowingly furnished another with the means of breaking the law. Now in the case of the factor paying the duties on goods illegally imported, the same reasoning would seem to apply. True it is, he may have had no share in importing the goods into this country, and had he not known that they were being imported contrary to law, he would have been justified in paying the duties. But if he knew that fact, the case would be different; because the probability is that, but for his having paid the duties, the goods would not have been admitted into this country at all,—so that the breach of law contemplated by his principal would never, but for his aid, have been carried fully into effect; and thus, by his having made such payment, he has knowingly assisted in accomplishing the illegal scheme. It seems to be a fallacy to say, \*as was said [ \*186 ] in the case of *Armstrong v. Toler*, that “if the amount of [ \*186 ] duties be paid by A. for B. it is the payment of a debt due in good faith from B. to the government.”(f) The duties payable on goods, are not, it is submitted, a debt due in good faith to the government, except the goods are legally imported. If they are known to be illegally imported, the duties are not received, but the goods themselves are seized by the Crown; and consequently no duties would be received on such goods, unless they were represented to be, what in fact they were not, namely, goods imported according to law. Such being the case then, it is difficult to see how the agent, besides contributing to the fraud of another, could avoid practising, on his own part, an actual fraud on the government,—which circumstance would, of course, alter his position very much for the worse; and for these reasons it is submitted, that if a factor or broker residing in this country, were to make advances under circumstances such as those mentioned above, he would not be held entitled to recover them from his principal.(g)

With regard to a factor residing abroad, the case would perhaps be different; for there, as we have already seen, mere knowledge is not considered to be evidence of participation.(h)

In the next place it may be stated, as an established rule of law, that if a factor or broker have been guilty of such \*gross negligence and unskilfulness in conducting his business, as to [ \*187 ] render what he has done altogether useless to the principal, or to subject him to an actual loss, he will not be intitled to claim his com-

(f) Cited Story on Agency, 310.

(g) See the late case of *M'Kinnell v. Robinson*, 3 M. & W. 434.(\*)

(h) *Pellecatt v. Angell*, 2 C. M. & R. 311.(\*) Dr. Story mentions another case in which the agent has been held intitled to recover, namely;—where he has advanced money to assist his principal in defending a prosecution for smuggling; *Law of Agency*, § 347; and, —supposing that the agent were not concerned in the scheme as consignee, and had no interest in the goods by way of commission,—there does not appear to be any objection to that opinion.

mission or advances in respect thereof.(i) And it appears that this will be the case, even although the negligence of the agent was not the proximate cause of the principal's loss; because, whatever may have been the immediate occasion of that loss, the property would not have been in a situation to sustain it, but for the agent's previous neglect.(k)

So, if the principal, on account of the misconduct of his factor or broker, refuse to complete a contract into which the latter has entered on his behalf, the agent will not be intitled to recover either his commission or advances in respect of that transaction. And accordingly, where a broker, who was instructed to purchase certain goods at a month's credit, did so, and paid the price and duties; but, after the goods were dispatched, the seller,—who had heard rumours which were detrimental to the principal's credit,—procured a broker to delay their arrival till the month's credit had expired, and then to tender them to the principal on payment of the price, whereupon he refused to accept them;—it was held, that the broker was not intitled to recover either the price, the duties, or his commission.(l)

At the same time, however, it should be observed, that if it be shown that the principal has received any advantage from the acts of his factor or broker, the latter will be intitled to a proportionate compensation.(m)

[ \*188 ] \*In like manner it would seem, that if a factor or broker through inadvertence or inexperience,—although without any improper motive, incur trouble or expense in the course of his employment, from which his principal derives no benefit, he cannot make it the subject of remuneration; because, as has been well said, he ought not to undertake the work, if it cannot succeed, and he ought to know whether it will succeed or not.(n) But still it should be borne in mind that, in cases like this, the result alone will not be conclusive proof that the work was improperly undertaken,—inasmuch as the error might have arisen from a *bonâ fide* mistake of judgment, without implying the want of proper skill on the part of the agent; and it will therefore be for the jury to say on the whole of the evidence, whether in the matter in question, the factor or broker has acted with the discretion which was due to the interests of his principal, or whether the work was altogether useless.(o)

And the same rules are applicable to cases in which the factor or broker has sustained damages from the execution of his mandate; for

(i) *White v. Chapman*, 1 Stark. 113, (2 E. C. L. R.); *Hamond v. Holiday*, 1 C. & P. 384, (11 E. C. L. R.) And see per Tindal, C. J., *Shaw v. Arden*, 9 Bing. 287. 290, (23 E. C. L. R.)

(k) See *Caffrey v. Darby*, 6 Ves. 496.

(l) *Hurst v. Holding*, 3 Taunt. 32.

(m) Per Best, C. J., *Hamond v. Holiday*, *supra*. See also, *Farnsworth v. Garrard*, 1 Camp. 38; and *Denew v. Daverell*, 3 Camp. 451. It was held at one time, that in such cases the only remedy of the principal was by cross action for the negligence of his agent; and that unless he had derived no benefit at all from the acts of the latter, evidence of negligence could not be admitted; *Browne v. Davis*, cited 7 East, 479; *Templar v. M'Lachlan*, 2 B. & Pul. N. R. 136; but it is believed that the rule to the contrary, as stated in the text, is now quite established. See the cases cited above; and also a very learned note by Mr. Smith, 2 Lead. Ca. 14, (Law Library.)

(n) *Duncan v. Blundell*, 3 Stark. 6, (14 E. C. L. R.); *Hill v. Featherstonhaugh*, 7 Bing. 669, (20 E. C. L. R.)

(o) See per Tindal, C. J., *Shaw v. Arden*, *supra*.

although, as we have seen, he is, under ordinary circumstances, intitled to claim such damages from his principal, yet, if it be made to appear that they were incurred by his own mistake or neglect, he alone will be liable for them.(p).

\*A factor or broker will likewise cease to be intitled to his commission, in the event of his becoming the executor [ \*189 ] or administrator of his principal.(q)

And lastly, if his authority be revoked, he will not be allowed, either at law or in equity, to charge for commission or advances in respect of business done after notice of such revocation.(r) But it appears that even the death of the principal will not have this effect, until the agent has had notice of that event. And therefore, where a ship and cargo were consigned to a factor with instructions to effect an insurance on freight,—which he did, and also to sell the ship; and the principal drew on the factor against the proceeds; but it appeared that the premiums had not been advanced nor the acceptances given, until after the principal's death, although before the factor had received any intimation thereof:—the court expressed a strong opinion, that the death of the principal did not operate as a revocation, so as to prevent the factor from having the fruits of that which was the consideration on which he disbursed his money.(s) At all events, if the executors of the principal confirm his instructions, the factor will be intitled to claim his disbursements.(t)

Such then are the rights which a factor or broker possesses against the person of his principal; and these may be enforced either by action at law, or by set-off,(u) and sometimes by suit in equity. This latter remedy however does not appear to have been frequently adopted;(v) and \*it seems that if the subject of a broker's claim be matter of set-off, and capable of proof at law, a bill by him [ \*190 ] against his principal for a discovery and account will not be sustained.(x)

It is said moreover, that where a factor receives a *del credere* commission on the sale of goods on which he has made advances, he must be deemed, by reason of his having given such guarantee, to have waived any personal recourse to the principal for the recovery of his advances, and to rely for this purpose on the fund alone; and it appears further, that in such cases the factor's advances will, to avoid circuitry of action, be treated as a payment *pro tanto* to his principal. So it is said, that a waiver of personal recourse to the principal may be presumed from the subsequent conduct of the factor; as if he sells the goods on credit, and, before the credit has expired, settles the

(p) *Capp v. Topham*, 6 East, 392.

(q) *Hovey v. Blakeman*, 4 Ves. 596.

(r) *Salte v. Field*, 5 T. R. 211, 215; *Hammonds v. Barclay*, 2 East, 227; *Vernon v. Hunkey*, 2 T. R. 113; S. C. 3 Br. C. C. 314; 3 Chitty on Com. & Man. 223; Story on Agency, § 349.

(s) *Hammonds v. Barclay*, *supra*, 229, 230. See however the dictum of Lord Ellenborough, *Watson v. King*, 4 Camp. 273.

(t) *Hammonds v. Barclay*, *supra*.

(u) *Dale v. Sollett*, 4 Barr. 2133.

(v) In the case of *Dinwiddie v. Bailey*, cited *infra*, it is stated, that the cause having stood over for the purpose of searching for precedents, it was reported, that there were numerous cases of accounts sought by a principal against a factor, and one upon the bill of the factor against the principal,—which was disposed of on another point; *Chapman v. Derby*, 2 Vern. 117; but that no case had been found of a bill by an insurance broker.

(x) *Dinwiddie v. Bailey*, 6 Ves. jun. 136.

account with his principal, deducting his commissions, and then pays over the balance to him; for, in such a case, the payment of the balance may be fairly treated as an assumption by the factor of the outstanding debt.(y) And lastly; even where a factor or broker has no *del credere* commission, yet he cannot recover money from his principal which he has paid to or passed in account with him,—although from the insolvency of the debtor he himself has never received it,—provided it appear from the circumstances of the case, that in the first instance he took the responsibility of the debtor on himself.(z)

[ \*191 ] \*CHAPTER III.—SECTION I.

ON THE RIGHTS OF FACTORS AND BROKERS.

PART II.

ON THEIR RIGHTS AGAINST THE FUND.

WE come now, in the second place, to treat of the rights possessed by factors and brokers as against the goods or funds of their principals which may happen to be in their hands, or under their control. These rights are two in number; namely, *first*,—the right of lien; and *secondly*,—in the case of a factor,—that of stoppage *in transitu*. Let us consider these in their order.

I. A lien is said to be,—the right in one man to retain that which is in his possession belonging to another, till certain demands of him, the person in possession, are satisfied;(a) and it is in its nature, either particular or general. A particular lien is the right which by common law,—in the absence of any special agreement,—is possessed by a bailee who has expended his labour and skill in the improvement of a chattel delivered to him, to retain such chattel for his charge in that respect;(b) whilst, on the other hand, a general lien confers on the bailee a right to hold, not only for demands specifically arising out of the thing retained, but for the general balance of accounts between [ \*192 ] the parties, \*in respect of dealings of the like nature;(c) and it arises, not by common law, but either out of an express contract, or out of a contract which is evidenced by the usage of trade, and to which, in the absence of any proof to the contrary, both the principal and the agent must be considered as having intended to conform.(d) The lien of factors, and that of the only class of brokers

(y) Story's Com. on Ag. § 342.

(z) Goupy v. Harden, 7 Taunt. 160, (2 E. C. L. R.); Edgar v. Bomstead, 1 Camp. 411; Jamieson v. Swainstone, 2 Camp. 546; note.

(a) Per Grose, J., Hammonds v. Barclay, 2 East, 327, 235.

(b) See per Parke, B., Jackson v. Cummins, 5 M. & W. 349; (\*) and Scarfe v. Morgan, 4 M. & W. 283; (\*) and per Best, C. J., Bevan v. Waters, 1 M. & Malk. 236, (22 E. C. L. R.)

(c) Paley on Prin. & Ag. by Lloyd, 127; 2 Selwyn's N. P. 1404, 9th edit.

(d) See per Tindal, C. J., Brandao v. Barnett, 2 Scott, N. R. 112.

who are held to possess this right, are both of the latter description.

Up to the middle of the last century it certainly was doubtful whether a factor had a lien, and could retain for the balance of his general account.<sup>(e)</sup> About that time however<sup>(f)</sup> a case occurred before Lord Hardwicke in which the question arose;<sup>(g)</sup> and after argument thereon at the bar, his Lordship adjourned the cause, and desired several merchants, who had been examined in the course of the proceedings, to attend in court, in order to be consulted by him with reference thereto. They attended accordingly; and after having asked them several questions upon the custom and usage of merchants relating to the matter in doubt, his Lordship gave his opinion to the effect;—that if there be a course of dealings, and a general account between the merchant and factor, and a balance be due to the factor, he may retain the ship and goods or produce, for such balance of the general account, as well as for the charges, customs, &c. paid on account of the particular cargo.<sup>(h)</sup> The same opinion was afterwards confirmed by Lord Mansfield,<sup>(i)</sup> and several other eminent \*judges;<sup>(k)</sup> and [ \*193 ] at length the proposition,—that a factor has a lien for his general balance,—came to be considered as too well established to admit of dispute.<sup>(l)</sup>

Brokers, on the contrary, do not usually possess the right of general lien. They may indeed, like other agents, be occasionally in a situation to exercise the right of particular lien;<sup>(m)</sup> but with one exception, that namely of insurance-brokers, the right of general lien does not pertain to them. The reason of this does not appear to be explained by any of our books; but it is probably the following. The right of lien is, as we have seen,—a right in one man to retain that which is in his possession belonging to another, until certain demands of him, the party in possession are satisfied;<sup>(n)</sup> and it thus presupposes, that the person making the claim has possession of property belonging to the person against whom the claim is made. But it will be remembered, that one distinguishing feature in the character of a broker is, that in general he is not intrusted with the possession of the property respecting which he is employed to act in that capacity, but that his business is merely that of a negotiator between the contracting parties;<sup>(o)</sup> and this circumstance explains why it is that he does not possess the right of general lien as against his principal;—because it is evident that, from the nature of his occupation, he has not, under ordinary circumstances, any property of the latter in his hands, on which that right can attach.

\*With respect to insurance-brokers, however, the case [ \*194 ] is different. It is, as we have seen, customary to intrust

(e) See observations of Lord Mansfield, in *Green v. Farmer*, 4 Burr. 2218.

(f) Hil. Term, 1775.

(g) *Kruger v. Wilcox*, 1 Ambler, 252.

(h) *Kruger v. Wilcox*, *supra*, 254.

(i) See *Godin v. London Assurance Company*, 1 Burr. 489; *Foxcroft v. Devonshire*, 3 Burr. 936; and *Green v. Farmer* *supra*.

(k) Particularly by Lord Kenyon and Mr. Justice Ashurst, in *Walker v. Birch*, 6 T. R. 262; and by Buller, J., delivering judgment in the House of Lords in *Lickbarrow v. Mason*, 6 East, 21. 28.

(l) Per Lord Kenyon, *Walker v. Birch*, 6 T. R. 262; and per Chambre, J., *Houghton v. Matthews*, 3 Bos. & Pul. 489.

(m) See *Thompson v. Beatson*, 1 Beatson, 1 Bing. 145, (8 E. C. L. R.)

(n) *Ante*, p. 191.

(o) *Ante*, p. 4.

them with the possession of policies of insurance which they have effected, in order to enable them to adjust losses which may have happened thereon; and it has accordingly become a well recognized principle in our law, that they, like factors, have a lien on such policies and the proceeds thereof, for their general balance.(p)

So, where a factor makes insurance on account of his principal, he is intitled to retain the policy, if the latter be indebted to him on the balance of accounts between them.(q) And where a man acts for his principal both as insurance-broker and factor, and in the former capacity effects policies and pays the premiums thereon, whilst in the latter he has goods placed in his hands for sale, on which he makes advances,—it seems that he is intitled to retain the sum received for a loss on any of such policies, as well in liquidation of his advances on the goods, as for the balance due to him on account of premiums.(r)

Nor is the lien of a factor or broker available merely against the principal, but he may, in some cases, assert it even against third parties: and accordingly it has been decided, that the assignee of a policy of insurance on goods,—who became such by the indorsement to him of the bill of lading by the consignor, after the latter had directed his [ \*195 ] \*factor to effect an insurance on such goods,—takes it subject to the lien of the factor for his general balance, and can only claim the money received thereon by the broker—into whose hands the factor has placed it for the purpose of settling the loss,—subject to that lien.(s)

So, although it was formerly held, that if—after a factor had advanced money to his principal on the security of goods in his possession,—the principal died, and the administrator sued the factor for the goods, the factor could not avail himself of his lien as a defence to that action, because, if there were debts of a higher nature than the factor's it would be a *devastavit* in the administrator to pay his debt,(t) yet there can be no doubt that this decision is no longer law, and that the factor would now be entitled to claim his lien, even against the specialty creditors of a deceased principal.(u)

In like manner it has been held, that a factor to whom goods have been sent for sale, and who has accepted bills of exchange drawn on him by his principal to the amount of their value, has a lien on such goods and the price thereof, available even against the crown.(x) But with reference to excisable commodities it would appear that, at

(p) Per Buller, J., *Whitehead v. Vaughan*, *Cooke's Bank. Law*, 547, 7th edit.; *Parker v. Carter*, ib.; *Montague on Lien*, App. 20; *Levy v. Barnard*, 8 Taunt. 149, (4 E. C. L. R.); *Snook v. Davidson*, 2 Camp. 218; *Lanyon v. Blanchard*, ib. 597; *Mann v. Forrester*, 4 Camp. 60; *Westwood v. Bell*, ib. 349; *Bell v. Jutting*, 1 Moore, 155, (4 E. C. L. R.); *Leeds v. Merc. Ins. Coy.* cited 2 Phillips on Ins. 575. It would appear that, so far as regards insurance-brokers practising in the city of London, they are intitled to a lien for their general balance on all policies in their possession, by the usage and custom of merchants in the said city. See the case of *Hewison v. Guthrie*, 3 Scott, 298, (36 E. C. L. R.), in which the custom was pleaded.

(q) Per Lord Mansfield, *Godin v. London Assur. Company*, 1 Burr. 494.

(r) *Olive v. Smith*, 5 Taunt. 56, (1 E. C. L. R.)

(s) *Man v. Shifner*, 2 East, 523.

(t) *Chapman v. Derby*, 2 Vern. 117.

(u) See *Montague on Lien*, 63; *Paley on Agency*, by Lloyd, 129, (Law Library) note (m); *Story Com. on Agency*, § 378.

(x) *The King v. Lee*, 6 Price, 329, (3 E. Ex. R.)

the present day, the law is different; for by statute 4 & 5 Viet. c. 20, s. 24, it is enacted; that all goods in respect of which any duty of excise is by law imposed, and all materials from which any such goods are made, and all implements for making the same, which are in the possession of the person who carries on the trade in respect of which the duty is or shall be imposed, or which are in the possession of any factor, agent or other person in trust for or for the use of [ \*196 ] the person carrying on such trade, shall be liable to all the duties of excise which, during the time of such possession, shall be charged on or be owing from the person carrying on such trade; and shall also be liable to all penalties which, during any such possession, shall be or shall have been incurred by the person carrying on such trade, for any offence by him committed against any act relating to the revenue of excise. The same section of the above statute likewise contains a proviso for the protection of *bonâ fide* purchasers from liability in the aforesaid cases; and it seems to be the settled opinion,—although the precise point has not been decided,—that, on the whole reading of that section, a factor who has in his possession exciseable goods on which he has made advances, cannot be held intitled to avail himself of his lien, in respect thereof, against the claim of the crown for the duties chargeable on such goods, or for penalties which the owner may have incurred with reference thereto.(y)

Having thus stated, in general terms, the rules as to the right of lien possessed by factors and insurance brokers, let us now inquire somewhat more particularly; *first*, how may this right be acquired; *secondly*, how may it be enforced; and *thirdly*, how may it be lost.

1. In order that a factor or insurance-broker may acquire the right of lien, he must, in the first place, be prepared to show, either that there is a sum due to him on the general balance of accounts, or else that he has advanced money on the particular goods which he refuses to deliver up. The right, indeed, springs from the existence of this claim.(z)

\*As to the nature of the claim itself, the following are [ \*197 ] the principal rules. First, it is said, that in all cases of lien there must be some certain and liquidated demand, and that where the amount of the demand cannot be ascertained except through the intervention of a jury, there can be no lien, unless there be an express contract to that effect.(a)

If, therefore, the liability of the factor or broker be merely that of surety for his principal, this will not intitle him,—without a special contract to that effect, to the exercise of his right of lien.(b)

(y) The above question arose, incidentally, in the case of *Regina v. Truman*, decided in the Exchequer in Hilary Term, 1843, but not yet reported; and it appears from the judgment in that case (with a note of which the author has been favored by his learned friend Mr. Streeten,) that the court expressed themselves to be of opinion,—“that the goods, being once chargeable with the duties, could not be discharged except by an actual *bonâ fide* sale.”

(z) *Montague on Lien*, 19.

(a) 3 Chitty on Com. and Man. 548.

(b) See *Drinkwater v. Goodwin*, Cowp. 251. The marginal note of that case is incorrect. It states,—that “a factor who becomes surety for his principal has a lien on the price of goods sold by him for his principal, to the amount of the sum for which he has so become



Still, however, it does not appear to be necessary that the balance due from the principal should be a debt actually payable *in presenti*; and accordingly, in a case in which it was proved that a factor had in his possession the effects on the credit of which he had given certain acceptances, which were then outstanding, it was held, that he might retain those effects, until he was indemnified against the liability to which he had thus subjected himself.(c)

So it appears further, that where a factor has a lien on goods in his possession for a debt payable *in presenti*, and he is permitted to retain such possession without his debt being discharged, the goods will become liable to a further lien for the interest which may accrue [ \*198 ] in respect of his \*debt, as well as to the lien to which they are already subject on account of the debt itself. Where therefore a factor,—who had in his hands at the time of the bankruptcy of his principal a quantity of sugars, on which he then had a lien for previous advances and interest,—had, at the request of the bankrupt before his bankruptcy, and of the assignees afterwards, deferred the sale thereof in expectation of a rising market, and had eventually sold them to great advantage,—he was held to be intitled to apply the proceeds of the sugars in payment of the interest of the debt accruing after the bankruptcy, and to prove for the balance of the principal sum, without any deduction being made in respect of the interest so received.(d)

But where the parties have contracted for a particular time or mode of payment, the factor or broker has no right to set up a claim of lien inconsistent with the terms of the contract,(e) because the general rule of law is, that where there is an express antecedent contract between the parties, a lien which grows out of an implied contract does not arise.(f)

Again: we have seen in the former part of this section, that there are certain usages of trade by which the right to commission possessed by those agents of whom we are now treating is liable to be affected. We have likewise seen that, in general, all advances made by them must be made in the regular course of their employment, in order to their being intitled to recover for them, and further, that if through their negligence or unskilfulness the work which they perform proves wholly useless to their employers, this circumstance will defeat their [ \*199 ] claim both for commission and advances. \*Now it is believed that these rules apply in their fullest extent, to all demands on the score of which the factor or broker may assert his right of lien; and accordingly, if it be made to appear that the allowance of such demands would be inconsistent with these rules, any claim of lien founded thereon will be defeated.(g) The rule, however by which, as we have seen, a factor or broker is precluded from

surety;”—but the case itself does not warrant any such doctrine, inasmuch as the claim of the factor then in question, arose, not from his having become surety merely for his principal, but from his having *actually paid* all the money due on the bond into which, as such surety he had entered. *Ibid.* 252.

(c) *Hammonds v. Barclay*, 2 East, 227; and see stat. 5 & 6 Vict. c. 39, s. 6.

(d) *Experte Kensington*, 1 Deac. 58; S. C. 2 Mont. & Ayr. 300.

(e) *Chase v. Westmore*, 5 M. & Sel. 180.

(f) *Per Lord Ellenborough, Stevenson v. Blakelock*, 1 M. & Sel. 536. 543.

(g) *Paley on Agency*, by Lloyd, 134, (Law Library); *Story on Agency*, § 398.

recovering by action, either his commission or advances, where his claim arises out of an illegal transaction, would not, it is presumed, apply in the case of lien. This latter being a right in the agent to retain the goods of his principal, or their proceeds, it is evident that such right cannot be defeated, except by the bringing of an action in which the agent must be made defendant; and such being the case it would seem to follow, that the principal could not, by alleging illegality against the agent, defeat his right of lien, because the rule of law is,—*in pari delicto, potior est conditio defendantis.*(A)

Another rule on this subject is;—that a factor has no right of lien in respect of debts which arise prior to the time at which his character as factor commences; and the reason of this has been said to be; that these liens are allowed for the convenience of trade, and with a view to encourage factors to advance money upon goods in their possession, or which must come to their hands as factors; but that debts which are incurred prior to the existence of the relation of [ \*200 ] principal and factor, are not contracted on this footing, (i) and that therefore, as to them no lien should be allowed. (j) These remarks would seem equally to apply to the case of insurance brokers. (k)

It is further necessary, in order to a factor or broker possessing his right of lien, that the debt in respect of which he claims that right should be due from the person whose property he seeks to retain by virtue of it; (l) and therefore if he know, or have reason to believe, that the person by whom he is employed is himself merely an agent, he will not be allowed to retain property of that agent's principal which may come to his hands in the course of his employment, for a debt due from the agent himself. (m) The reason of this rule was well explained by Lord Chief Justice Tindal in a recent case,—where the question was as to the right of a banker to retain the property of a third person deposited with him by the agent of that person, for a debt due from the agent himself. The contract of lien “being made between the banker and the customer only, cannot,” said his lordship, “bind the rights of other parties. It is competent to the banker and his customer to agree that the banker shall have a lien on all property on which the customer can lawfully give it, which may come to the hands of the banker; and this agreement may be expressed in words, or may be inferred from the course of trade: but it is not competent for them to agree expressly, or in any other manner, that the banker shall have a lien on the property of other persons on which the custo-

(A) See *Scarfe v. Morgan*, 4 M. & W. 270, 282. (\*) Does not the judgment of Abbott, C. J., in the case of *Cannan v. Bryce*, 3 B. & AL 179, (5 E. C. L. R.) seem to countenance the opinion, that as between the assignee of the principal, and the agent, this rule would not hold? It is submitted that had the action in that case been brought by the bankrupts themselves before their bankruptcy, they could not have recovered, inasmuch as they appear to have been *in pari delicto* with the defendant; and yet the defendant was not allowed to retain for his advances, as against the assignee, who claimed for the benefit of the lawful creditors.

(i) Per *Chambers, J.*, *Houghton v. Matthews*, 3 Bos. & Pul. 485, 488.

(j) See observations of *Ellenborough, C. J.* *Mann v. Forrester*, 4 Camp. 61.

(l) See *Barry v. Longmore*, 12 Ad. and El. 639, (40 E. C. L. R.) and cases cited *infra*.

(m) *Maanen v. Henderson*, 1 East, 335; *Snook v. Davidson*, 2 Camp. 218; *Lanyon v. Blanchard*, *ib.* 597; and see the judgment of *Gibbs, C. J.* in *Westwood v. Bell*, 4 Camp. 449, 552.

[ \*201 ] mer had no authority to \*give one."(*n*) And so it is manifest, that a factor or broker and his principal are not competent to enter into any such agreement.

If however a policy of insurance be effected by a broker, in ignorance that it does not belong to the person by whom he is employed, he is held to have a lien upon it for the amount of the balance which that person owes him; (*o*) and the reason of this is, that the broker must be supposed to have made advances on the credit of the policy which was thus allowed to remain in his hands. (*p*) Nor, as it seems, will the broker's right of lien be defeated, merely by his having notice of the third person's interest before he receives the money under the policy; the only effect of such notice being, that from the time he receives it, the excess beyond the satisfaction of the broker's general balance, becomes money had and received by him to such third person's use. (*q*)

The only other requisite towards the acquisition by a factor or broker of the right of lien is, that he have possession of the thing which, by virtue of that right, he claims to retain. The right to retain springs, as we have said, from the fact of there being a debt due from the principal to the agent. But in order to render this right effectual, there must exist the power to retain; and this power, it is [ \*202 ] manifest, can spring only from the possession of the thing which \*is sought to be retained. "A man cannot have a lien on goods," says Chief Justice Gibbs, "unless he have in some sort the possession of the goods."(*r*)

Let us now inquire, what will amount in law to such a possession by the factor or broker as to invest him with this power?

As between principal and factor the ordinary rule seems to be, that the latter has no lien on the goods for his general balance, unless they come into his actual possession. (*s*) It has, however been made a question, whether, in the event of a bill of lading duly indorsed, being transmitted to a factor who had at the time a balance of account in his favour, the possession of this document would not give to him the right of taking and keeping possession of the goods represented thereby, as a satisfaction for his debt; and although there is no express decision to the effect that such possession would be sufficient, yet the opinion, that under such circumstances the factor would have a lien on the goods, appears to have been favoured by, at least, one very eminent judge. (*t*) But as already stated, there is no decision which

(*n*) *Brandao v. Barnett*, 2 Scott, N. R. 113.

(*o*) *Westwood v. Bell*, *supra*.

(*p*) *Per Ellenborough, C. J., Mann v. Forrester*, *supra*.

(*q*) *Ibid.* But from the case of *Levy v. Barnard*, 8 Taunt. 149, (4 E. C. L. R.) it would appear to have been the opinion of the court of Common Pleas, that notice to the broker, prior to the receipt of the money payable on the policy, that the person by whom he had been employed was not acting on his own account, would deprive him of any lien thereon, except for the specific premiums paid in respect thereof. If this be so, the doctrine stated in the text must be received with some qualification. It is however difficult to say what is the precise point decided in the case referred to.

(*r*) *Hutton v. Bragg*, 7 Taunt. 15, 26, (2 E. C. L. R.); see also *per Buller, J., Lickbarrow v. Mason*, 6 East, 27; *Heywood v. Waring*, 4 Camp. 291; and *per Lord Eldon, Hallott v. Bousfield*, 18 Ves. 188.

(*s*) *Kinlock v. Craig*, 3 T. R. 119.

(*t*) *Mr. Justice Abbott, in Patton v. Thomson*, 5 M. & Sel. 350, 367. "Taking this case," said the learned Justice, "as one between principal and factor who were engaged in a general course of dealing, the principal consigning to his factor from time to time cargoes

goes this length.(u) Formerly indeed the law was quite the reverse;—for it was held, that though the factor might have given acceptances on the faith that consignments would be made \*to [ \*203 ] him, still this was a mere executory agreement, for the non-performance of which only a right of action accrued, and that no property in the goods was thereby vested in him:(x)—and this conclusion seems to have been come to without at all considering the question, whether, had the factor under such circumstances come into possession of the bill of lading, his rights would have been in anywise enlarged.

On referring however to more recent cases on this subject it will be found, that our courts have now changed their views with reference thereto; and it appears that at the present day, a factor's right of lien on goods, the insignia of which only have come to his hands, will depend on the question;—was it the intention of the consignor to vest the property in the consignee, from the moment of delivery to the carrier?—and it is said, that if the intention of the parties to pass the property, whether absolute or special, in certain ascertained chattels, be established, and they are placed in the hands of a depositary,—no matter whether such depositary be a common carrier, or ship-master, employed by the consignor or a third person,—and the chattels are so placed on account of the person who is to have that property, and the depositary assents, it is enough: and that it matters not by what document this is effected; nor is it material whether the person who is to have the property be a factor or not, for such agreement may be made with a factor, as well as with any other individual.(y) Wherever therefore the bill of lading or other document operates as evidence of a change of property, the factor will be entitled, immediately on receipt thereof, to claim his lien; and on the arrival of the goods, he will have a right to insist on their being delivered to him, in order that he may retain them by virtue thereof.(z) [ \*204 ] \*Accordingly where it appeared that S. and Co. had made advances to B., and that B., as a security had consigned goods to them for sale on his account, and had also remitted to them the invoice and bill of lading indorsed in blank;—it was held, that S. and Co. might maintain trover for the said goods against the assignees of B., he having become bankrupt after the receipt of the bill of lading by S. and Co., but before the goods were delivered to him.(a)

But where the bill of lading has not been delivered to the consignee, and there is no other evidence of an intention in the consignor to consign the specific property to him, no lien will attach;—because, in the absence of evidence of such intention, the consignor will be

to be sold for his account, and remitting bills and drawing upon him in such a manner as to form a general account between them, I should have required further time to consider whether, if the factor might have retained this cargo had it come to his possession, he would not also have a right to insist upon taking possession, in order that he might retain."

(u) It seems however, to have been so held in America; *Rice v. Austin*, 17 Mass. Rep. 197.

(x) *Kinloch v. Craig*, in *Dom. Proc.* 3 T. R. 786.

(y) See *Bryans v. Nix*, *infra*.

(z) *Haille v. Smith*, 1 Bos. & Pal. 563; *Bryans v. Nix*, 4 M. & W. 775. 791; (\*) *Evans v. Nichol*, 4 Scott, N. R. 43. 53.

(a) *Haille v. Smith*, *supra*. See also per Lord Ellenborough, in *Vertue v. Jewell*, 4 Camp. 31; and in *Patten v. Thompson*, 5 M. & Sel. 356, 357.

held intitled to change the destination of the goods, at any time before they come into the actual possession of the consignee.(b)

So it appears that possession of the goods by a servant or agent appointed by the factor or broker for that purpose, will be sufficient to intitle him to enforce his right of lien;(c) and that the possession even of the principal himself will confer this right on the agent, provided there be an agreement between the parties, with the terms and provisions of which the existence of such right is consistent.(d)

On the contrary however, where a factor is employed to purchase goods, and they are delivered to him as the agent and for the use of his principal, such delivery will be considered as a delivery into the possession of the latter; and for this reason the factor's lien will not attach.(e)

[ \*205 ] \*So where it appeared that a consignment of goods had been made for the express purpose of their being delivered by the consignee into the government stores, it was held, that the possession of the goods gave the consignee no right of lien, because, having accepted the consignment for a particular purpose, he could not legally divert it to any other.(f) In like manner where goods had been deposited with a factor for sale, for the net proceeds of which he promised to be accountable, and to pay the same to his principal, it was held that,—the goods not having been sold,—his possession thereof gave him no lien thereon for his general balance, although had they been sold, he might have claimed a lien on the proceeds, for his commission in respect of that particular sale.(g) And so where A. had agreed to sell goods to B., which were to be accounted for in part of a debt due from A. to B., and C., with notice of this agreement, was appointed by consent of both parties to sell the goods as factor for A.; he was held to have no right of lien on the proceeds of such goods for a debt due to him from A.,—because, from the moment he had notice of the agreement between A. and B., he was bound not to controvert it.(h) Cases like these, indeed, are governed by the maxim, *conventio vincit legem*; or to use the words of Lord Kenyon, applying this maxim to the subject now before us,—“the lien which the factor has on the goods of his principal, arises from an agreement which the law implies: but where there is an express stipulation to the contrary, it puts an end to the general rule of law.”(i)

[ \*206 ] \*It is further requisite in order to constitute such a possession as will give a factor or broker the right of lien, that the property which he claims to retain should not only belong to the person from whom the debt to him is due, but that it should come

(b) *Mitchel v. Ede*, 11 Ad. & El. 888, (39 E. C. L. R.)

(c) Per Lord Ellenborough, *McCombie v. Davies*, 7 East, 5. 8.

(d) *Reeves v. Capper*, 6 Scott, 877.

(e) *Gurney v. Sharp*, 242. This case is generally cited as having been decided on the ground, that the advances, on account of which the lien was claimed, had been incurred by the factor without the authority of his principal, and the marginal note certainly leads to this impression. On examining the judgment of the court however, it will it is believed, be found that the true ground of their decision was that stated in the text.

(f) *Soath v. Berridge*, 4 Taunt. 684.

(g) *Walker v. Birch*, 6 T. R. 258. 263.

(h) Per Buller, J., *Weymouth v. Boyer*, 1 Ves. Jr. 416. 425.

(i) *Walker v. Birch*, *supra*; and see *Burn v. Brown*, 2 Stark. 272, (3 E. C. L. R.); *Muir v. Fleming*, 1 D. & R. 29, (16 E. C. L. R.)

to his hands as the agent of that person. Where therefore, C., a corn merchant, advised B., his factor, of an intended consignment of oats, and drew on him in anticipation thereof; but instead of sending the bill of lading to B., he indorsed and remitted it to one H., desiring him to sell the oats for his account, whereupon H. sent the bill of lading to B. requesting him to act for him in the matter, and B. on the arrival of the vessel, took possession of the cargo and paid the freight;—it was held, that B. had no lien thereon, because the goods were in his hands as the agent of H. only, and not as the agent of C. (k) It was said in that case however, that if C. had authorized H. to employ a broker to sell the goods, and B. had been employed in consequence, he might perhaps have had a lien thereon. (l)

Again it must appear, in order to intitle a factor or broker to his lien, that his possession of the property which he claims to retain was not tortious; and accordingly his right will be defeated, wherever it is shown that such possession was acquired by means of misrepresentation, or in any other manner unauthorized by the principal. (m)

So if the factor or broker had been intrusted with property merely for a particular purpose, he will not be entitled to retain it under a claim of general lien. Thus, where a policy of insurance was deposited with a broker for safe custody only, he was held to have acquired no general lien thereon by means of such possession. (n) [ \*207 ] And in like manner, where it appeared that the factor of a ship-owner had requested the master to deliver to him the ship's certificate of registry, in order to enable him to pay certain duties at the custom-house, and it was delivered to him accordingly; it was ruled, that his having been so intrusted with the possession of that document did not intitle the factor to claim a lien thereon, for the general balance due to him from the ship-owner. (o)

So if the factor or broker have notice of the bankruptcy of his principal, prior to the time at which he gets possession of the property on which he claims his right of lien, this will in some cases divest him of that right. Formerly indeed it was held, that a trader could under no circumstances confer a right of lien on his factor, after having committed even a secret act of bankruptcy; (p) and the reason assigned for this rule was, that after the bankruptcy the goods became the property of the assignees, so that, to have allowed the bankrupt to give his factor a lien thereon, would have been to permit the latter to claim that right on goods sent to him by a person to whom they did not belong. (q) But the law on this subject has been recently very much altered by statute; (r) and it is presumed that a factor or broker would now be held entitled to his lien, if the goods or policy on which he claimed it were shown to have come to his possession before the date and issuing of the fiat against his principal—provided that is, he had, at the time they so came to his possession, no notice of any prior

(k) *Bruce v. Wait*, 3 M. & W. 15. (\*)

(l) *Per Parke, B.*, *ibid.* 20.

(m) *Madden v. Kempster*, 1 Camp. 12; *Taylor v. Robinson*, 8 Taunt. 648, (4 E. C. L. R.)

(n) *Muir v. Fleming*, 1 D. & R. 29, (16 E. C. L. R.)

(o) *Burn v. Brown*, 2 Stark. 272, (3 E. C. L. R.)

(p) *Copland v. Stein*, 8 T. R. 199; see also *Vernon v. Hankey*, 2 T. R. 113; *Walker v. Balfour*, 2 Camp. 579.

(q) *Per Grosse, J.*, *Copland v. Stein*, *sup.* 206.

(r) 2 & 3 Vic. cap. 29.

act of bankruptcy having been committed by him;—and further that, in the case of a factor, even if he were to have notice of the bankruptcy of his principal whilst he was in the course of selling the [ \*208 ] goods, he would still have a right to proceed with the \*sale, to receive the money, and to hold it in payment of his own balance.(s)

Nor, as it seems, would it be in all cases necessary in order to intitle a factor to this right, to show that the goods did actually come into his possession prior to the date of the fiat in bankruptcy against his principal. We have already seen, that where there is evidence to show that it was the intention of the consignor to vest the property in the goods in the consignee, from the moment of delivery to the carrier, the mere possession by the consignee of the insignia of such property will be sufficient, under ordinary circumstances to intitle him to claim his lien on the goods themselves;(t) and so it is submitted that, according to the construction of the statute already referred to, if a contract to the above effect were *bonâ fide* entered into between the factor and his principal, prior to the date of the fiat against the latter,—the factor having no notice of any previous act of bankruptcy having been committed by him,—and in pursuance of such contract the bill of lading or other insignia of property in the goods were transmitted to the factor, the fact of the latter having notice of the bankruptcy of his principal after the receipt of the bill of lading, but before the arrival of the goods themselves, would not divest him of his right of lien.

But if the acts on which the factor relies, as evincing an intention on the part of the consignor to vest the property in him from the time of its being delivered to the carrier, were proved not to have been done until after the date of the fiat, or notice by the factor of the consignor's bankruptcy, then the case would be different. Thus it was held under the old law, that even an actual possession given to [ \*209 ] a \*factor by a carrier by order of the shipper,—but which order was not given until after the shipper's bankruptcy, —was not such a possession as would give him a lien against the assignees, although the goods were shipped on account of the factor, and bills had been accepted by him on the faith of such shipment;(u) and, reasoning on the same principle, it is clear that, according to the present state of the law, if the order for delivery to the factor were not given by the shipper until after the former had notice of his bankruptcy, or until after the date and issuing of the fiat against him, possession of the goods acquired by the factor under such order, would not intitle him to a lien against the assignees of the shipper, even although, as in the case cited, the factor had accepted bills on the faith of the consignment.

It appears, moreover, that possession acquired by a factor even after the death of his principal, will in some cases intitle him to a lien on the property which has thus come to his hands; and accordingly,

(s) See per Lord Ellenborough, *Robson v. Kemp*, 4 Esp. 232, 236.

(t) See ante, p. 203; and the cases of *Haille v. Smith*, 1 Bos. & Pal. 563; *Bryant v. Nix*, 4 M. & W. 775, 791;(\*) and *Evans v. Nichol*, 4 Scott, N. R. 43, 53.

(u) *Nichols v. Clement*, 3 Price, 547, (1 E. Ex. R.)

where a principal had given notice to his factor of an intended consignment of a ship to him for the purpose of sale, and had in consequence drawn bills on him which the factor accepted, but before the arrival of the ship the principal died; whereupon it was contended, that the factor had no lien on the proceeds of the sale of the ship for his advances and acceptances, because whatever authority the principal had given was countermanded by his death;—the court, although they decided the case on another ground, still expressed themselves to be of opinion, that it was not very consistent with justice to say, that after the factor had advanced premiums and paid bills on the credit of the consignment, the death of the consignor should operate as a revocation, so as to prevent the factor from having the fruits of that which was \*the foundation and consideration upon [ \*210 ] which he disbursed his money.(x)

And lastly: it is now well settled, that though the statute of limitations has run against a demand, yet, if the creditor obtain possession of goods on which he has a lien for a general balance, he may hold them for that demand by virtue of his lien.(y) The reason of this is,—that the debt is not discharged by the statute, but the remedy only; the creditor therefore has an actual subsisting demand at the time the goods came into his possession, and hence it follows, that he may enforce that demand by the lien which the law has given him for his general balance.(z)

2. We propose to show secondly, how the right of lien of a factor or broker may be enforced.

A lien, we have seen, is said to be the right in one man to retain that which is in his possession belonging to another, until certain demands of him, the person in possession, are satisfied;(a) and in accordance with this definition it is held, that he who has a lien can in general enforce it, only by retaining possession of the property on which he claims his right.(b) Property detained as a lien cannot, it is said, be sold, used or disposed of by the party detaining, unless with the consent of the owner;(c) but he may plead his lien as a defence to any action which may be brought against him for the recovery of the property, or he may use it as matter of title whereon to ground an action for the \*purpose of reclaiming such property, if he have been unlawfully dispossessed of it.(d) [ \*211 ]

The rights of a broker in enforcing his lien, are, it is believed, measured strictly by the above rule; those of a factor however, are somewhat more extensive. Thus it is clear, that where a factor has a lien on goods which have been intrusted to him for the purpose of sale, he may claim this right, not only on the goods whilst they are in his possession, but likewise on the price of the goods when sold; and hence it follows, that, having the lien, he may sell the goods and

(x) *Hammonds v. Barclay*, 2 East, 227. 235.

(y) Per Lord Eldon, *Spears v. Hartley*, 3 Esp. 81, 82.

(z) *Spears v. Hartley*, supra; and see *per curiam*, in the case of *Higgins v. Scott*, 2 B. & Ad. 414, (23 E. C. L. R.) (a) Ante, p. 191.

(b) Per Buller, J., *Lickbarrow v. Mason*, 6 East, 27.

(c) *Hostler's case*, Yelv. 66; *Jones v. Pearle*, 1 Stra. 556; *Jones v. Thurloe*, 8 Mod. 171; per Gibbs, C. J., *Pothonier v. Dawson*, Holt, N. P. C. 383. 385, (3 E. C. L. R.)

(d) *Story*, Com. on Ag. § 371.



enforce payment to himself in opposition to his principal.(e) So it is said, that where the principal consigns a cargo of goods to his factor for sale with a limit as to price, the latter may bring the goods into the market against the will of the principal, in order to satisfy his own advances, provided the principal does not, on receiving notice of the factor's intention so to do, repay him the amount.(f) And a sale by a factor under such circumstances would, even without notice, bind the principal to third parties.(g)

In like manner, although at common law a lien is a mere personal right which cannot be transferred to a pawnee,—so that if a person, having a lien, abuses it by pledging the goods, the owner's right to the possession revives,(h)—still it is submitted, that a factor may now, by virtue of the various "Factors' Acts" (particularly the 5 & 6 Vic. c. 39), take advantage of his lien by pledging the goods on which [ \*212 ] \*it is claimed, for an advance to himself not exceeding in amount the sum which, at the time of such pledge, was due to him from his principal; and that the principal could not retake the goods, without discharging the claim of the pawnee for the advances made by him on the security thereof, unless it were shown that such pawnee had notice, at the time of making the advance, either that the factor had no authority to pledge the goods, or that he was acting *malâ fide* in respect thereof against the owner of such goods.(i)

But the above rule,—that a factor employed to sell goods retains his lien on the price of the goods when sold,—does not appear to apply to the case of a factor employed to purchase. The latter has, it is true, a lien on the goods purchased, for his advances made in respect thereof, and is not bound to deliver or ship them subject to the absolute control of the principal, until he is reimbursed or secured for such advances,—unless, that is, there be an usage of trade or a course of dealing to the contrary;(k) but it does not appear to have been decided that he has any right to enforce his lien by selling such goods, although he might perhaps be held to have the right of pledging them for an advance to himself, provided it were not greater in amount than the sum due to him from his principal on the general balance of accounts at the time the pledge was made. This rule is evidently consistent with the maxim above laid down, namely,—that property detained as a lien cannot be sold, used, or disposed of by the party detaining, unless with the consent of the owner; for, as in the case of a factor for sale, the consent of the principal to his parting with the property by way of sale is implied in the very nature of his commission, so it is plain that in the case of a factor for purchase no such [ \*213 ] consent is implied; and hence it follows, \*that unless there be evidence of the principal's express consent to that effect, the factor's right of lien cannot, in this instance, be taken to confer

(e) Per Bayley, J., *Hudson v. Granger*, 5 B. & Al. 27. 31, (7 E. C. L. R.) See also, per Mansfield, C. J., *Drinkwater v. Goodwin*, Cowp. 256.

(f) 3 Kent, Com. on Amer. Law, 642, 3d edit.

(g) Per Lord Abinger, *Warner v. McKay*, 1 M. & W. 591. 598.(\*)

(h) *Daubigny v. Duval*, 5 T. R. 604; per Tindal, C. J., *Scott v. Newington*, 1 M. & Rob. 252.

(i) See stat. 5 & 6 Vict. c. 39, ss. 3. 6.

(k) 2 Ball, Com. on Merc. Jur. § 755.

on him the additional right of selling the goods in order to repay himself his advances.(f)

3. Let us now inquire, in the third place, how the right of lien of a factor or broker may be lost.

First; it is clear that, in general, the lien of a factor or broker will continue, only so long as the property on which the lien is claimed remains in his possession, and that if he once part with the possession after the lien attaches, the lien is gone.(m) If therefore he deliver up the property to his principal;(n) or if, having a lien on the goods, he deliver them to a ship-carrier, to be conveyed on the account and at the risk of his principal,(o) or if he sell them when he has no authority so to do,(p) or if he pledge them in a manner not warranted by law;(q) in all these cases the factor or broker, by parting with the possession, parts with his lien.

But if the factor or broker gives up the property to his principal by virtue of a special agreement, under the terms of which the latter acquires no interest therein, but only a license or permission to hold it for a limited time,—it would \*seem that in such a case [ \*214 ] the possession of the principal would be regarded as the possession of the agent, and that, therefore, the latter would not lose his lien.(r)

And so it has been said, that if one who intended to give a security to another to the extent of his lien, were to deliver to that other the actual possession of the property on which he had the lien, and were, after giving him due notice of his lien, to appoint him as his servant to keep possession of the goods for him, in this case likewise the lien would be preserved.(s)

Again: if the principal, by means of fraud and misrepresentation, induce the factor or broker to give the property up to him, and he take it away in order thereby to destroy the lien, the factor or broker will have a right to repossess himself of such property by virtue of his lien.(t)

In like manner it is held, that the agent will in no case lose his lien, where he does not part with the property voluntarily. Thus, where it appeared that the principal had consigned a cargo of goods to his factor in Denmark, which were seized by the Danish government (upon the breaking out of hostilities between that country and Great Britain) after the factor had been obliged to pay the freight and other charges thereon; and, on the restoration of peace, the British government ordered compensation for the losses sustained by their subjects

(f) The contrary doctrine appears to have been held in America. See *Parker v. Brancher*, 2 Law Reporter, 46; cited, *Story on Agency*, 331; Dr. Story however merely refers to that case; and the author regrets that,—having been able to meet with the first volume only of the Law Reporter,—it is consequently out of his power to furnish the reader with any statement of the grounds on which the doctrine laid down therein was founded.

(m) Per Buller, J., *Lickbarrow v. Mason*, 6 East, 21. 27; and per Lord Mansfield, *Godin v. London Assurance Company*, 1 Burr. 494.

(n) *Kruger v. Wilcox*, Ambler, 254.

(o) *Sweet v. Pym*, 1 East, 4.

(p) Ante, p. 212.

(q) *Scott v. Newington*, 1 M. & Rob. 252.

(r) See the case of *Reeves v. Capper*, 6 Scott, 877. 884.

(s) Per Lord Ellenborough, *McCombie v. Davies*, 7 East, 5. 7; see also *Man v. Shifner*, 2 East, 523. 530.

(t) *Wallace v. Woodgate*, 1 C. & P. 675, (11 E. C. L. R.); *Rosae v. Branstead*, 2 Roll. 438.

from the seizures made in Denmark,—whereupon the value of the said goods was awarded to the principal's assignees by the compensation-commissioners;—it was held, that the factor was intitled to a [ \*215 ] portion of \*the fund received by the assignees, equal to the amount of his disbursements in respect of freight and other charges.(u)

And so it appears, that if the property be taken from the factor or broker, under an execution against his principal at the suit of a third party, he will still be intitled to insist on his lien.(x) But if it be taken under an execution at the suit of the factor or broker himself, and such execution prove invalid, he will not be allowed to retain the property by falling back upon his right of lien, even although such property has been sold to him under the execution, and has never been removed off the premises,—because the sheriff, in order to sell, must have had possession, and after he had had possession from the agent, the subsequent possession of the latter must have been acquired under the sale, and was not therefore such a possession as would confer the right of lien.(y) The reason of this is plain; because, as we have already seen, the right of lien will attach only where possession is acquired from a person who has authority to confer this right; but the authority of the sheriff is an authority to sell merely, and therefore, if the person who acquires possession from the sheriff cannot make out a valid title under the sale, it is not competent for him to retain such possession, by claiming to hold from the sheriff under another title which the latter had no power to confer.

But there is a difference between the last mentioned case and those cases in which the factor or broker, after having parted with the property to the principal himself, receives it again from him,—inasmuch as it is always in the power of the principal to confer the right of lien, by giving possession of the property to the person by whom that right is claimed: and accordingly it has been held, that where a broker gives up a policy of insurance on which he has a lien, to the [ \*216 ] party \*by whose order it was effected, the lien will revive on his becoming repossessed of the policy;(z) and so, where it appeared that a broker, who was in advance to his principal for premiums, had given up the policy of insurance to him, and had afterwards, upon hearing reports not favourable to the credit of his principal, obtained the policy from him under pretence of receiving payment for a loss which had happened thereon, but in reality with a view to holding it as a security for his own demand:—it was held, that such possession was sufficient to intitle him to claim his lien.(a)

A factor or broker will likewise lose his lien if, when the property is demanded of him, he claims to retain it on a different ground, making no mention of his lien.(b)

(u) *Ex parte Good*, 2 Deac. Bank. Rep. 389.

(x) Per Best, C. J., delivering the judgment of the court, *Jacobs v. Latour*, 5 Bing. 130. 132, (15 E. C. L. R.)

(y) See *Jacobs v. Latour*, *supra*.

(z) *Levy v. Barnard*, 8 Taunt. 149, (4 E. C. L. R.)

(a) *Whitehead v. Vaughan*, *Cooke's Bankrupt Law*, 547, 7th edition, decided before Bal-  
lar, J., and Lord Mansfield.

(b) *Boardman v. Sill*, decided before Lord Ellenborough, sittings after Mich. Term, 49  
Geo. 3, cited 1 Camp. 410, *in notis*.

But he will not lose his lien by the mere fact of his omitting to say,—when the demand is made,—that he claims to hold the property in that right,(c) or by his claiming to hold it for a sum, greater than the actual amount of his lien on the property in question.(d) In the former of these cases, therefore, the principal must tender to the agent the amount of his lien, before he can have a complete right to the property;(e) and in the latter, likewise, a tender is equally necessary,—because, as has been well said, the natural conclusion from the fact of a person claiming to retain certain property in respect of two sums is,—not that he meant to waive his right as to one—but that he meant to act upon both; and hence it becomes the duty of the owner to tender at least one of these sums, in order that the party [ \*217 ] who \*claims the lien may have an opportunity of reflecting, whether he really has a right to detain the property as to the other.(f)

Again: a factor or broker will lose his lien, if he take a security for the debt in respect of which he claims such lien:—"It is well established," says Lord Chief Justice Tindal, "that if a security is taken for the debt for which the party has a lien upon property of the debtor, such security being payable at a distant day, the lien is gone:"(g) and indeed it would seem that, in general, if the possession commences under an implied contract, and a special contract is afterwards made as to the time or mode of payment, the one contract will destroy the other, and the lien which existed under the implied contract will be lost,—provided, that is, such special contract be apparently inconsistent with the right to retain possession of the property.(h) But still it appears, that although by taking a security,—such as a bill of exchange,—for his debt, the factor or broker will lose his lien, this right will revive if the bill be not paid at maturity;(i) and the same rule would seem equally applicable to any other case in which, after the lien existing under an implied contract has attached, a special time or mode of payment is agreed upon between the parties, and the principal makes default in paying his factor or broker at the time or in the mode specified,—because, by the breach of the special contract, the implied contract revives, and consequently the right of lien which arises out of it revives likewise.(k)

Lastly: where a factor or broker claims a lien on property \*in his hands belonging to his principal, and, on the [ \*218 ] bankruptcy of his principal, he comes in under the commission and proves for the amount of such claim, his lien is gone;—because such proof is equivalent to payment, and therefore vests in the assignees the same right to the possession of the property, as the principal him-

(c) *White v. Gainer*, 1 C. & P. 324, (11 E. C. L. R.) S. C. 2 Bing. 23, (9 E. C. L. R.)

(d) *Scarfe v. Morgan*, 4 M. & W. 270.(\*)

(e) *Per Best, C. J.*, *White v. Gainer*, 1 C. & P. 326, (11 E. C. L. R.)

(f) *Per Alderson B.*, *Scarfe v. Morgan*, 4 M. & W. 281, 282.(\*)

(g) *Hewison v. Guthrie*, 3 Scott, 298. 311, (36 E. C. L. R.)

(h) See per Lord Eldon, *Cowell v. Simpson*, 16 Ves. Jr. 275; and *Chase v. Westmore*, 5 M. & Sel. 180; particularly the very able judgment of Lord Ellenborough in the latter case.

(i) See per Lord Ellenborough, *Stevenson v. Blakelock*, 1 M. & Sel. 535. 544.

(k) *Ibid.*

self would have had if, prior to his bankruptcy, he had paid the debt for which such property was detained.(l)

II. Intimately connected with the factor's right of lien is the right which he possesses, in certain cases, to stop goods which he has consigned to his principal *in transitu*,—or in other words, to prevent the latter, in the event of his becoming bankrupt or insolvent before the goods come to his actual or constructive possession, from taking possession of such goods, and to detain them until the price thereof be paid or tendered. Indeed the factor's right in this respect may very properly be considered simply as a means of enforcing his right of lien, although,—for the sake of securing a more lucid arrangement of our subject,—we have treated of it in this place as a substantive independent right. Let us now endeavour to ascertain: *first*, under what circumstances a factor has the power of exercising the right in question; *secondly*, how it may be exercised; and *thirdly*, how it may be defeated.

First, then, as to the circumstances under which a factor may exercise the right of stoppage *in transitu*.

The first case in which the question,—as to the right of a consignor to stop the goods consigned, *in transitu*,—appears to have arisen, is that of *Wiseman v. Vandepuut*.(m) There A., being beyond sea, [ \*219 ] consigned goods to B., then \*in good circumstances in London; but before the ship sailed news came that B. had failed, and thereupon A. altered the destination of the goods, and consigned them to the defendant. On the first hearing of the case, the Lord Chancellor ordered an action of trover to be brought, to try whether the consignment vested the property in the consignees; and it was then determined, in a court of law, that it did: but the court of equity thought it right to interpose and give relief,—holding, that if A. could, by any means, prevent the goods from coming into the hands of B. or his assignees, it was allowable in equity; and since that time it has likewise been uniformly held in our courts of law, that the consignor may seize the goods before they are actually or constructively delivered to the consignee, in case of the insolvency of the latter before payment of the price.(n)

It will be observed however, that in the above case the parties stood to each other merely in the relation of vendor and vendee, and not in that of principal and factor; and this leads to the remark that,—although as between parties holding the former relation, the doctrine of stoppage *in transitu* has been so long and so clearly settled, yet the application of that doctrine to cases in which the parties hold the latter relation, is of much more recent date.

The earliest case in which this question appears to have arisen as between principal and factor, is that of *Snee v. Prescott*;(o) and there it was held, that where agents abroad are in disburse for their principal, and upon being doubtful of his circumstances they make bills of lading to their own order, indorsed in blank, and afterwards the

(l) *Ex parte Horaby*, Beck. Bankruptcy Cases, 351. 354; see also *Ex parte Solomon*, 1 Glyn. & Jam. 25.

(m) Decided in the Court of Chancery in the year 1696; reported 2 Vern. 803.

(n) *Per Grose, J., Lickbarrow v. Mason*, 2 T. R. 68. 76.

(o) 1 Atk. 245; decided before Lord Hardwicke, in the year 1743.

agent's partner, who resides at the place to which the goods are consigned, writes them word that the principal has become bankrupt, and desires them to send him the bills-of-lading, and an order to the captain to deliver the goods, which they send [ \*220 ] to him accordingly,—such partner may retain the goods on behalf of himself and company, against the assignees under the commission, until he is reimbursed so much as the partnership is in advance, notwithstanding the first bills-of-lading may have come to the hands of the principal. And the like conclusion was afterwards come to in the following case. The plaintiff, who was a merchant at Leghorn, bought a large quantity of goods by the direction of the defendant, who resided in England, which he consigned to him and drew bills of exchange for the money. The bills were accepted by the defendant, but were protested for non-payment, on his becoming insolvent and assigning, his effects in trust for the benefit of his creditors. The goods arrived at the port of London, whereupon the agent for the consignor and the agent for the creditors severally applied to the captain for them, but he refused to deliver them until the right was settled. The plaintiff thereupon brought his bill to have the goods delivered, and the Lord Chancellor decreed them to be delivered accordingly. (p)

But although in both the above cases the parties actually stood to each other in the relation of principal and factor, no point founded on this relationship appears to have been raised in either; and indeed,—if we except one sentence in the judgment of Lord Henley in the latter case, namely, that “the plaintiff was to be considered as substantially a merchant selling goods to the defendant,” (q)—nothing is stated in the reports of the arguments or judgments in the cases referred to, which would lead to the conclusion that they were decided on any other grounds, than those which subsequent decisions have shown to be exclusively applicable to the ordinary cases as between consignor and consignee. [ \*221 ]

At length however, in the case of *Feize v. Wray*, (r) the question as to a factor's right to stop goods consigned by him to his principal, *in transitu*, came directly before the Court of King's Bench; and by their judgment on that occasion the extent of this right was, for the first time, accurately defined. The case was as follows. In the month of June 1801 an order was given by B. to F., his correspondent abroad, to purchase certain goods for him. F. bought them accordingly of another merchant, who was a complete stranger to B., and had no account or correspondence with him. On the 2d of August the goods were shipped; on the 4th F. drew bills of exchange on B. for the price; and on the 10th the latter received the bill-of-lading and invoice. On the 2d of September, B. became a bankrupt, and on the next day the defendant, on behalf of F., obtained from B.'s brother the bill-of-lading and invoice. B.'s acceptances were never paid. The goods were afterwards sold on account of F. by his agent in this country; and the assignees of B. having brought trover in order to recover possession thereof, a verdict was found in their favour, subject

(p) *D'Aquila v. Lambert*, 1 Ambler, 399, cor. Lord Henley, 9th June, 1761.

(q) *Ibid.* 400.

(r) 3 East, 93; decided in Michaelmas Term, 1802.



to the opinion of the court on a special case. The cause accordingly came on for argument, and it was then objected on behalf of the assignees, that F. had no right to detain the goods, because no relation existed between B. and F. on which the right to stop *in transitu* could attach,—inasmuch as F. was a mere factor purchasing on behalf of B., and, as such, had no right to stop *in transitu*, like the vendor or owner of the goods, but had only a lien on them for his balance so long as they remained in his possession. The court however overruled the objection, and decided in favour of the right of F. to retain possession of the goods in question. “It has been \*contended,” said Mr. Justice Lawrence, delivering judgment in the above case, “that the right of stopping *in transitu* does not attach between these parties; that B. must be considered as the principal for whom the goods were originally purchased; that F. was no more than his factor or agent, purchasing them on his account; and that the right of stopping *in transitu* does, in point of law, apply solely to the case of vendor and vendee. If that were so, it would nearly put an end to the application of that law in this country; for I believe it happens, for the most part, that orders come to the merchants here from their correspondents abroad to purchase and ship certain merchandise to them; the merchants here, upon the authority of those orders, obtain the goods from those whom they deal with, and they charge a commission to their correspondents abroad upon the price of the commodity thus obtained. It never was doubted but that the merchant here, if he heard of the failure of his correspondent abroad, might stop the goods *in transitu*. But, at any rate, this is a case between vendor and vendee, for there was no privity between the original owner of the goods and B.; but they may be considered as having been first purchased by F., and again sold to B. at the first price, with the addition of his commission upon them. He then became the vendor as to B., and consequently had a right to stop the goods *in transitu*.”(s)

In addition to the above authorities, there is likewise a *dictum* of Lord Ellenborough to the effect,—that where a person purchases goods for another in his own name or on his own credit, so as to make himself liable for them to the vendor, he may retain them while *in transitu*.(t) In like manner it has been more recently decided by the Court of Exchequer,—with reference to the case of a home-factor, [ \*223 ] —that where such an agent has made himself responsible for \*the price of the goods which he has consigned to his principal, he may stop them *in transitu*;(u) and accordingly it may now be laid down as a settled rule in our law,—that wherever either a home or a foreign factor consigns goods to his principal by his order, which goods the factor has procured in his own name and on his own credit, he becomes, *quoad* his principal, the vendor of such goods, and has therefore the right, in the event of the principal becoming insolvent before his advances in respect of the goods are repaid, to stop them *in transitu*.

It seems moreover, that the right of the consignor to stop *in tran-*

(s) Feize v. Wray, 3 East, 93. 101, 102.

(t) See *Usparicha v. Noble*, 13 East, 338.

(u) *Hawkes v. Dunn*, 1 Crom. & Jer. 519.(\*)

*situ* will not be restricted to those cases only in which the consignee has become bankrupt or insolvent before the goods are paid for; but that this right will likewise be held to exist wherever, under the terms of the particular contract, the consignor appears to have reserved to himself the power of withholding the actual delivery of the goods until the consignee should comply with a certain stipulated mode of payment, but with which mode of payment the consignee has not complied. And accordingly, where a parcel of wheat had been sold on the following terms,—“payment by banker’s draft on London at two months’ date, to be remitted on receipt of invoice and bill-of-lading;”—but it appeared that on receipt of the invoice and bill-of-lading, the consignee, instead of a banker’s draft on London, transmitted to the consignor his own acceptance for the invoice price, whereupon the consignor returned the acceptance and stopped the wheat;—the court were of opinion, that the intention of the parties under the contract was, that the consignor should retain the power of withholding the actual delivery of the wheat, in case the consignee failed in remitting the banker’s draft, not upon delivery of the wheat, but on receipt of the bill-of-lading; and that, the condition not having been performed by the consignee, \*the consignor was justified in preventing the wheat from being delivered.(x) [ \*224 ]

But if, at the time the consignment was made, the factor be indebted to his principal on the general balance of accounts to a greater amount than the value of the goods, and such consignment have been in fact made in order to cover this balance, the factor will not have the right to stop the goods *in transitu*; because, under the circumstances, the property therein will vest in the principal absolutely, so as, from the moment of the shipment, to deprive the factor of all control over them.(y)

In like manner, if the factor, instead of being primarily liable to the seller for the price of the goods, have become a mere surety for his principal to that amount, he will have no right to stop them *in transitu*; because, it is only by reason of his being liable in the first instance for the price of the goods, that he can be considered as a vendor *quoad* to his principal to whom he has shipped them, and it seems that, unless he actually possess that character, he cannot exercise the right in question.(z)

And so, it would appear, that if the balance due to the factor be of such a nature as merely to give him a lien on the goods whilst they are in his possession, and he afterwards deliver them to a ship-carrier to be conveyed on account and at the risk of his principal, he cannot recover his lien by stopping the goods *in transitu*, and procuring them to be redelivered to him by virtue of a bill-of-lading signed by the carrier in the course of the voyage.(a)

\*Secondly; as to the mode in which a factor may exercise the right of stoppage *in transitu*. [ \*225 ]

It is quite clear that the mere fact of bankruptcy or insolvency of

(x) *Wilmhurst v. Bowker*, 3 Scott, N. R. 272.

(y) *Wiseman v. Vandeputt*, 2 Vern. 203; *Vertue v. Jewell*, 4 Camp. 31.

(z) *Per Lord Ellenborough*, *Siffken v. Wray*, 6 East, 371. 381.

(a) See *Sweet v. Pym*, 1 East, 4.



the consignee will not, of itself, operate as a countermand of the delivery of the goods to him, and that therefore, in order to effect this, the consignor must, by some means, actually stop the goods before they get into the possession of the consignee. (b) Now it was formerly held, that the only way of effecting this stoppage *in transitu* was by obtaining actual possession or corporal touch of the goods; (c) and it was said, that where the owner of goods had reason to believe that the purchaser would not perform his part of the contract by paying for them, he might retake them into his own possession, whilst on their passage, by any means short of felony. (d) As was well observed, however, by the late Lord Eldon, this was a rule of dangerous extent and one which could not be safely acted upon; (e) and the courts accordingly, for the purpose of favouring the right of stoppage *in transitu*, relaxed the rule as to the necessity of obtaining actual possession of the goods in order to the proper exercise of that right, and held instead,—that if the consignor gave notice of his claim on the goods, to the person who had the custody thereof during their transit, that notice would be equivalent in law to an actual stoppage of such goods, provided it were given before they had arrived at the destination originally contemplated by the consignee, unless, that is, they had in the meantime come into his actual or constructive possession. Where therefore certain wines were consigned to one L., which, he having [ \*226 ] become bankrupt and the duties being in \*consequence unpaid, were after their arrival lodged in the king's stores, and it appeared that, whilst they were there, the agent of the consignor endeavoured to get possession of them, but did not succeed, and they were subsequently sold in order to pay the duties and other charges;—it was held that, inasmuch as, before the sale, the agent of the consignor had claimed and endeavoured to get possession of the wines, this must be considered a sufficient stopping *in transitu* to secure the rights of the consignor, and consequently to intitle him to the proceeds of the sale. (f) So it has been held, that notice by the consignor to the carrier in whose custody the goods are, not to deliver such goods, will revest the property therein in the consignor; (g) and it has likewise been held, that notice to a wharfinger will have the same effect; (h) so that, in either case, such notice will operate as a stoppage *in transitu*.

In all these cases however, the notice, in order to be effective as a stoppage *in transitu*, must be given to the person who has the immediate custody of the goods; or, if it be given to the principal whose servant has the custody, it must be given at such a time, and under such circumstances, that the principal, by the exercise of reasonable diligence, may communicate it to his servant in time to prevent the delivery to the consignee,—because, as has been well said, it would be the height of injustice to hold, that notice to a principal at a dis-

(b) See the observations of Buller, J., in *Ellis v. Hunt*, 3 T. R. 464. 469.

(c) Per Lord Kenyon, *Northey v. Field*, 2 Esp. 613, 614; and per Gibbs, C. J., *Litt v. Cowley*, 7 Taunt. 169, 170, (2 E. C. L. R.)

(d) Per Gibbs, C. J., *Litt v. Cowley*, Holt, N. P. C. 340, (3 E. C. L. R.)

(e) See 19 Ves. jun. 609.

(f) *Litt v. Cowley*, 7 Taunt. 169, (2 E. C. L. R.)

(f) *Northey v. Field*, *supra*.

(h) Per Heath, J., *Mills v. Ball*, 2 Bos. & Pal. 457. 463.

tance would be sufficient to re-vest the property in the unpaid consignor, so as to render the principal liable in trover for a subsequent delivery by his servants to the consignee, when, from the distance and want of means of communication, it was impossible to prevent that delivery.(i)

\*The goods, moreover, may be stopped *in transitu*, [ \*227 ] either by the consignor himself or by his agent; and accordingly, it is said, that an agent expressly authorised for the purpose, or a general agent without particular authority,—provided his act be afterwards confirmed by the consignor,—may effectually stop goods *in transitu*, in any manner in which the consignor himself might have done so.(k) But the person who stops the goods must, it is said, be in some degree the agent of the consignor at the time of his so stopping them; and it appears to be doubted whether a stoppage by a mere stranger will be legal, even although the consignor subsequently give his assent thereto.(l)

Judging however from a recent case on this subject, it would appear that the court will exercise a considerable degree of liberality in construing authorities of this nature; and accordingly, where it was proved that the agent, who had stopped a cargo of goods *in transitu*, had been appointed by the consignor to act for him, should any difficulty arise with reference to certain bills of exchange which were mentioned in his letter of instructions, amongst which bills was one drawn on account of the cargo in question,—this was held to amount, at least, to some evidence of a general authority in the agent to take such steps as he should think fit for the purpose of securing those bills; and, by implication, to an authority to stop the cargo for the price of which one of the bills was drawn.(m)

Lastly; as to the means by which the factor's right to stop *in transitu* may be defeated.

The consignor's right to stop *in transitu* exists, as the term itself imports, only so long as the goods are in their \*passage [ \*228 ] to the consignee; and hence it follows, that this right will in all cases be defeated by the fact of the goods arriving at the actual or constructive possession of the latter,(n) because, by this means, the *transitus*, or state of passage, is determined. If therefore the goods be delivered at the consignee's own warehouse,(o) or be taken possession of by his assignees;(p) or if the consignee, having no warehouse of his own, is in the habit of using that of some other person, for instance that of his packer or wharfinger, for the purpose of receiving goods consigned to him, and the goods be delivered there;(q) or if they be delivered at a place where the consignee means them to remain, until a fresh destination is communicated to them by orders from himself,(r)—in all these cases the *transitus* will be considered to

(i) *Whitehead v. Anderson*, 9 M. & W. 518. 534.(\*)

(k) 3 Chitty on Com. and Man. 344.

(l) *Nicholls v. Le Feuvre*, 7 Scott, 577; *Siffken v. Wray*, 6 East, 371. 381; and *Chitty on Com. and Man. supra*. (m) *Whitehead v. Anderson*, 9 M. & W. 518. 533.(\*)

(n) Per *Tindal, C. J.*, *Jackson v. Nichol*, 7 Scott, 577. 590.

(o) Per *Parke, B.*, *James v. Griffin*, 2 M. & W. 623. 633.(\*)

(p) *Ellis v. Hunt*, 3 T. R. 464; *Scott v. Pettit*, 3 Bos. & Pul. 469.

(q) *Rowe v. Pickford*, 8 Taunt. 83, (4 E. C. L. R.); per *Chambre, J.*, *Richardson v. Goss*, 3 Bos. & Pul. 119. 127; *Leeds v. Wright*, *ibid.* 320; *Scott v. Pettit*, *ibid.* 469.

(r) *Wentworth v. Outhwaite*, 10 M. & W. 436;(\*) *Dixon v. Baldwin*, 5 East, 175; and see per *Parke, B.*, *James v. Griffin*, *supra*.

be at an end, and the right of the consignor to stop the goods will be defeated.

In cases such as these, however, one question must frequently arise, namely,—whether the person, to whose possession the goods are shown to have come, was an agent so far representing his principal as to make a delivery to him a full, effectual, and final delivery to the principal; or whether, on the contrary, such person was virtually acting as a carrier or mean of conveyance to or on account of his principal, in a mere course of transit towards him. If the former have been the case, then the principles stated in the decisions above referred to will [ \*229 ] apply; but if the latter, \*the possession of the agent will be considered to have been merely that of a middle-man between the consignor and consignee, so as not to determine the *transitus*, and consequently, such possession will not be sufficient to defeat the right of the latter to stop the goods.(s)

And even in cases in which the consignee himself has, either in person or by his agent, taken possession of, or assumed a control over the goods, a question will sometimes arise as to the intention with which he has done these acts; and on this question of intention will depend the further question,—whether by his having taken such possession or assumed such control, the *transitus* of the goods was determined. Thus, if the consignee gives orders for the goods to be landed at a particular wharf, and it appears that his intention was merely to make the wharfinger an instrument of further conveyance to his own warehouse, then the *transitus* will still be considered as continuing: and in like manner, if it appear that the sole intention of the consignee in landing the goods, was to prevent the captain of the vessel from which they were landed from becoming liable to demurrage, such landing will not determine the *transitus*.(t)

So if the consignee take possession of, or assume a control over the goods, with the intention of allowing them still to remain for the benefit of the consignor, this will not determine the transit. This last doctrine is well illustrated by the following decision.

Goods were consigned by A. to B.; but before they arrived at the warehouse of the latter he found himself to be in failing circumstances, and, being an honest person, \*he declined, on this [ \*230 ] account, to receive them when they did arrive. He sent the goods accordingly to the warehouse of another man, accompanied by a letter stating that he did not choose to receive them, and desiring him to hold them for the benefit of the consignor. This was before his bankruptcy. The day after the act of bankruptcy he addressed a letter to the consignor himself, telling him what he had done; and upon this a question arose between him and the assignees of B., as to which party was intitled to the possession of the goods. For the assignees it was argued;—that the goods were the property of B. by the act of sale; that they had been sent to him; that the contract

(s) *Edwards v. Brewer*, 2 M. & W. 375; (\*) *Slater v. Le Feuvre*, 2 Scott, 146, (30 E. C. L. R.); *Smith v. Goss*, 1 Camp. 282; *Coates v. Railton*, 6 D. & C. 492, (13 E. C. L. R.); and see *Dixon v. Baldwin*, *supra*; *Rowe v. Pickford*, *supra*; and *Mills v. Ball*, 2 Bos. & Pul. 457.

(t) *Per Parke, B., James v. Griffin*, 2 M. & W. 623, 634, (\*)

which vested the property in him could not be rescinded except by the consent of both parties; and that, as he had become bankrupt before he gave notice to A., and before the latter consented to receive the goods back, it became impossible for him then to rescind the contract himself, or to give A. a right to receive the goods, without the assent of the assignees. On the other side it was argued, that a man must be presumed to do every thing which it was his interest to do, until the contrary be made to appear; and that, therefore, as the person to whom the goods were sent had received them as the assets and for the benefit of the consignor, the consent of the latter to that act must be presumed. With this argument the court agreed, and accordingly they held that the consignor had still the right to take possession of the goods.(u)

It appears moreover that the rule stated above will apply, not only to those cases in which, as in that of *Atkin v. Barwick*, the person in whose custody the goods were placed by the consignee is shown to have been privy to the intention of the latter, but even to cases in which such intention has not been communicated to him. This point was decided in the following case.

\*An action of trover was brought by the assignees of a bankrupt for some lead which had been shipped by one S., [ \*231 ] and consigned to E., the bankrupt. The defendants were wharfingers; and the question was, whether S. had a right to stop the lead *in transitu*. The facts in evidence were these. The lead in question was shipped on board two vessels, which arrived in the Thames in the month of December, 1834. After the arrival of the vessels, the captains called at the warehouse of the bankrupt for orders. They could however get no directions from him, and they, in consequence, threatened to land the lead unless he gave them some instructions about it. The bankrupt,—who was then in insolvent circumstances and indebted to S.,—accordingly told his son to request the captains to land the lead at the defendant's wharf; but at the same time he told him that, under the circumstances in which he was then placed, he did not intend to take the lead, and that S. ought to have it. In compliance with these instructions the lead was afterwards landed at the wharf of the defendants; but no communication was ever made to them as to what had passed between the bankrupt and his son, as to the intention of the former not to take the lead. Under these circumstances Lord Abinger,—who tried the cause—reserved the question, whether the *transitus* was at an end; and gave the defendants leave to move to enter a nonsuit, provided the court should be of opinion that this was not the case. The case was afterwards very fully argued, and the court, after taking time to consider, decided (Lord Abinger *dissentiente*) that the facts proved at the trial did not amount to a determination of the transit, and accordingly nonsuited the plaintiffs.(x) “I am of opinion,” said Mr. Baron Alderson, delivering judgment in the above case, “that the true question is,—whether the acts done amounted to a taking possession of the lead by the bankrupt as owner, and if this be so, then the intention of the bankrupt is, as it seems to me, most [ \*232 ] \*material, and it is not material whether it was or was not

(u) *Atkin v. Barwick*, 1 Stra. 165; 8 C. 10 Mod. 432.

(x) *James v. Griffin*, 3 M & W. 623.(\*)

communicated to the defendants, except as a test for the jury to judge whether such intention was real or not. Here the intention is to be taken as real; and indeed the facts are abundantly clear on that point. Now the taking possession here, is by the bankrupt's agent; and the declared intention of the bankrupt to him, when he directs him to do the act, appears to me to be precisely the same as if the bankrupt had himself done the act, making the same declaration of his intention at the time. The agent has only a qualified authority, and I cannot see how, under such circumstances, his ordering the goods to be landed can be held to be a taking possession of them by the bankrupt as owner, when the bankrupt, at the time, declares that his agent is not to do so,—that he does not mean thereby to take the goods, but to relieve the captains from the inconvenience of delay, leaving, however, the goods for S., who afterwards stopped them *in transitu*.”(y) And in like manner it was observed by Mr. Baron Parke in the same case:—“The intention not to take the goods as owner was clearly proved by the bankrupt's son; and the only effect as I think, of the want of the disclosure of that intention to the wharfingers, was to give them rights as between themselves and the vendee,—for whom they may have supposed that they were acting as warehouse-keepers,—which, but for the want of that disclosure, they might not have possessed. It does not vary the rights of the unpaid vendor, which continue or not, according to the real character which the person bears who has the custody of the goods.”(z)

It is said, however, that the question of intention can rise, only where it is attempted to be shown that the *transitus* was put an end to by [ \*233 ] something which took place before the \*goods came to the natural end of their journey; and not to any case in which it appears that they came to the possession of the consignee by reaching their ultimate destination.(a)

Again: it would appear that if the consignee, before the goods reach their ultimate destination, takes them out of the possession of the carrier into his own, either with or without the consent of the carrier;(b) or if he does any other act which is equivalent to taking actual possession thereof on his own account, the *transitus* will be considered to be at an end, and the consignor will be held to have no longer any right to stop them;(c) and therefore, where it appeared that the consignee of a quantity of sugars, upon receiving notice from the carrier that they had arrived, took samples therefrom, and, for his own convenience, desired the carrier to allow them to remain in his warehouse until he should receive further directions, but before they were removed the consignee became bankrupt;—it was held, that these acts

(y) *James v. Griffin*, 2 M. & W. 630.(\*)

(z) *Ibid.* 635. For the arguments against the doctrine stated in the text, see the very able judgment of the Lord Chief Baron, *ibid.* 636—642.

(a) *Per Alderson, B., James v. Griffin*, 1 M. & W. 30.(\*)

(b) *See Whitehead v. Anderson*, 9 M. & W. 518, 534.(\*)

(c) *Per Lord Kenyon, Wright v. Lawes*, 4 Esp. 82; *per Lord Alvanley, Mills v. Ball*, 9 Bos. & Pul. 457, 461; *Foster v. Frampton*, 6 B. & C. 107, (13 E. C. L. R.); and see *per Parke, B., James v. Griffin*, 2 M. & W. 633;(\*) and *per Tindal, C. J., Jackson v. Nichol*, 7 Scott, 577, 592.

of the consignee had determined the transit, and that the consignor's right of stoppage was gone.(d)

In like manner it would appear, that if the consignee, before the arrival of the goods, takes constructive possession of them, the *transitus* will be at an end; and therefore if, \*whilst the goods [ \*234 ] are on their passage, the carrier enters expressly or by implication into a new agreement,—distinct from the original contract for carriage,—to hold the goods for the consignee as his agent, not for the purpose of expediting them to the place of original destination pursuant to that contract, but in a new character, for the purpose of custody on account of the consignee, and subject to some new or further order to be given by him, the consignor's right to stop the goods will be defeated.(e)

But although if the consignee take either actual or constructive possession of the goods before the voyage has completely terminated, the consignor's right of stoppage is gone, yet there is no authority for the position, (and principle, it is said, seems to be the other way,) that a mere demand by the consignee,—without any delivery,—before the voyage has completely terminated, will deprive the consignor of this right.(f)

Again: a delivery of goods by the consignor on board a ship chartered by the consignee, will operate as a delivery to the latter so as to defeat the right of the consignor to stop them *in transitu*;(g) and, in like manner, if the vendor send an order to a wharfinger to deliver the goods to the vendee, and the wharfinger make an entry in his books, transferring the goods into the name of the vendee, this will be sufficient to pass the property, provided nothing remains to be done by the seller, in order to the completion of the contract, but merely to make delivery of the goods. But if it be necessary, either by the terms of the contract or by the order to the wharfinger, that any thing should be done to the goods previous to the delivery, the transfer will not be \*complete until that thing be done, and the right of the [ \*235 ] vendor to stop the goods will not be defeated. If therefore part of a bulk be sold, so that weighing is necessary in order to determine the identity or individuality of the article; or if the whole of a commodity be sold, but weighing is necessary for the purpose of ascertaining the price, because the quantity is unknown, the weighing or measuring must precede the delivery, and the symbolical delivery by transfer in the wharfinger's books, without such weighing or measuring, will not be sufficient to defeat the vendor's right of stoppage *in transitu*.(h)

So, if the consignee take possession, under the bill-of-lading, of part

(d) *Foster v. Frampton*, *supra*. In the case of *Holtz v. Pownall*, 1 Esp. 240, it was held by Lord Kenyon, that if a consignee of goods took possession of them, whilst the ship on board which they were was performing quarantine, this was not such a possession as to defeat the consignor's right to stop them, because the voyage was not completed until the ship had performed her quarantine. But the authority of this case is very questionable; and indeed it would appear, from the decisions quoted above, to be now overruled.

(e) *Whitehead v. Anderson*, 9 M. & W. 518. 535.(\*)

(f) *Per Tindal, C. J., Jackson v. Nichol*, 7 Scott, 577. 592.

(g) *Fowler v. McTaggart*, 7 T. R. 442; *Ingles v. Usherwood*, 1 East, 515.

(h) *Per Lord Denman, Swanwick v. Sothern*, 9 Ad. & El. 895. 900, (36 E. C. L. R.) See also, *Hanson v. Meyer*, 6 East, 614; *Shepley v. Davis*, 2 M. & Sel. 397; *Busk v. Davis*, 5 Taunt. 617, (1 E. C. L. R.); *Withers v. Lys*, Holt, N. P. C. 18, (3 E. C. L. R.)

of the goods consigned, with the intention of taking the possession and dominion of the whole, this will be sufficient to defeat the consignor's right to stop the goods;(i) and in like manner, if the goods be in the possession of a wharfinger, and the vendee, having a general order for the delivery of the whole, take away part under that order, this, it appears, will put an end to the vendor's right to stop the residue.(k) But where several packages of goods had been sold under an entire contract, some part of which were forwarded to the consignee by land and some by water-carriage, and it appeared that after the arrival of the former at their destination, the consignor stopped the latter *in transitu*; it was held, that he was intitled to retain the part actually stopped, until he was paid the price of the whole, but that he had no right to retake that which had arrived at the journey's end.(l)

[ \*236 ] \*But it is very doubtful whether, whilst the goods are in the hands of a carrier, the mere act of marking, taking samples, or the like, without any removal from the possession of the carrier,—although done with the intention of taking possession,—would amount to such a constructive possession as to defeat the right of stoppage *in transitu*, unless it were accompanied with such circumstances, as to denote that the carrier was intended to keep and assented to keep the goods, in the nature of an agent for custody.(m)

It has been decided further;—that if, after the goods are sold, they remain in the warehouse of the vendor, and he receives warehouse-rent for them, this will put an end to his right to stop them *in transitu*,—because, as has been said, if a man pay for part of a warehouse, so much of it becomes his own, and thus an executed delivery is made by the seller to the buyer, of the goods of the latter which are allowed to remain therein.(n) But if the vendor send an invoice to the vendee, which states that the goods are to remain on the premises of the former “at rent,” the effect of this will be, not to make the warehouse of the vendor the warehouse of the vendee, but to make it part of the contract between the parties, that the goods are not to be delivered until, not the price only, but the rent also is paid; and thus the vendor will have a right to hold the goods both for the price and the rent.(o)

The right of the consignor of goods to stop them *in transitu* will likewise be defeated, by the assignment of the bill-of-lading by the consignee to a third person for a valuable consideration; and there is no distinction for this purpose, between a bill-of-lading indorsed in [ \*237 ] blank, and one indorsed to \*a particular person.(p) If however the bill-of-lading contain a condition, for example, if there be an indorsement on it to the effect, that the goods are to be delivered provided the consignee pays a certain draft, then every indorsee takes it subject to that condition, and will have no title to the goods unless it be performed.(q)

(i) *Jones v. Jones*, 8 M. & W. 431 (\*); *Slubey v. Heyward*, 2 H. Bl. 504.

(k) *Hammond v. Anderson*, 1 Bos. & Pul. N. R. 69; and see *Bunney v. Poyntz*, 4 B. & Ad. 568, (24 E. C. L. R.) (l) *Wentworth v. Outhwaite*, 10 M. & W. 436. (\*)

(m) *Whitehead v. Anderson*, 9 M. & W. 518, 535. (\*)

(n) Per Lord Ellenborough, *Hurry v. Mangles*, 1 Camp. 452, 453.

(o) Per Bayley, B., *Miles v. Gorton*, 2 Com. & M. 504, 513.

(p) *Lickbarrow v. Mason*, 2 T. R. 63; see also, 6 East, 21.

(q) *Barrow v. Coles*, 3 Camp. 92.

So if the assignee of the bill-of-lading act *malâ fide*, for instance, if he knew that the consignee was insolvent, and took the assignment of the bill-of-lading for the purpose of defeating the right to stop *in transitu*, and so of defrauding the consignor out of the price,—he will be held to stand in the same situation as the consignee, and the consignor will still be intitled to his right of stoppage.(r) But the mere fact of the assignee having known, that, at the time the bill-of-lading was assigned to him, the consignor had received no money payment for the goods, but merely an acceptance not then due, will not, without evidence of collusion, intitle the consignor to stop them *in transitu*.(s)

A mere pledge of the bill-of-lading by the consignee, however, will not defeat the right of the consignor to stop the goods *in transitu*; for, although by the pledge the legal right to the possession of the goods passes to the pawnee, still the consignor may, on the insolvency of the consignee, resume his interest in them, subject to the rights of the pawnee, and will be intitled, at least in equity, to the possession of whatever may remain after satisfying his claim. And further, if the goods comprised in the bill-of-lading be pledged along with other goods belonging to the consignee, the consignee will have a right to have all the goods of the \*former appropriated to the discharge of [ \*238 ] the pawnee's claim, before any of the goods comprised in the bill-of-lading are so appropriated.(t)

Nor will a mere sale of the goods by the consignee to a third party defeat the right of the consignor to stop them *in transitu*; the general rule being, that the second vendee of a chattel cannot stand in a better situation than his vendor;(u) and in like manner, a delivery of part of the goods by the first vendor to the subvendee, will not prevent the former, on the insolvency of the original vendee, from retaining such part of the goods as may still remain in his possession and under his control, until the price of the whole be paid.(x)

It has likewise been well settled, that the consignor's right to stop *in transitu* will not be taken away by the fact of the consignee having partly paid for the goods,(y) nor by his having given bills of exchange for the price;(z) and it appears that, where the consignee has given his acceptance for the price of the goods, the consignor may, on the insolvency of the former, stop them *in transitu* without tendering back the bill.(a)

Lastly: the right of the consignor of goods to stop them *in transitu* will not be defeated by any claim of the carrier against the consignee, for his lien for a general balance;(b) \*nor will this right be [ \*239 ] defeated by reason of the goods, whilst in their transit, being attached by process out of the court of the mayor of London, at the suit of a creditor of the consignee.(c)

(r) Per Lord Ellenborough, *Cumming v. Brown*, 9 East, 506. 514. (s) *Ibid*.

(t) *In re Westzinthus*, 5 B. & Ad. 817, (27 E. C. L. R.); see also, 1 Smith, L. C. 435, (Law Library.)

(u) *Miles v. Gorton*, 2 Com. & M. 504; *Dixon v. Yates*, 5 B. & Ad. 339, (27 E. C. L. R.)

(x) *Miles v. Gorton*, *supra*. (y) *Hodgson v. Loy*, 7 T. R. 440.

(z) *Feizo v. Wray*, 3 East, 93; *Miles v. Gorton*, *supra*.

(a) *Edwards v. Brewer*, 2 M. & W. 375. (\*)

(b) *Oppenheim v. Russel*, 1 Bos. & Pul. N. R. 42; *Jackson v. Nichol*, 7 Scott, 577. 591.

(c) *Smith v. Goss*, 1 Camp. 262.



## [ \*240 ] \*CHAPTER III.—SECTION I.

## ON THE RIGHTS OF FACTORS AND BROKERS.

## PART III.

## ON THEIR RIGHTS AGAINST THIRD PARTIES.

HAVING thus treated of the rights of factors and brokers as against their principals, we now proceed, in pursuance of the arrangement proposed at the commencement of the present chapter, to treat of their rights as against third parties. These are the two following. *First*; the right of factors and brokers to sue third parties on contracts into which the latter may have entered with them in that capacity; and *secondly*, their right to sue third parties for wrongs of which the latter may have been guilty towards them in the course of their agency. The former of these rights, again, may be very properly treated with reference to the following cases; *first*, with reference to those cases in which the factor or broker has only a qualified right to exercise it; and *secondly*, with reference to those in which his right to exercise it is absolute. Let us consider these in their order.

1. And first, of the cases in which the factor or broker has only a qualified right to sue third parties, on contracts into which the latter may have entered with him in the course of his employment.

It is a general rule in our law, that where a contract of sale or other agreement is entered into with a mere servant or agent on behalf of [ \*241 ] another person, such servant or agent \*cannot maintain an action thereon. Thus in the ordinary case of a sale of goods by a shopman, the right to sue for the price of the goods sold is always considered to belong exclusively to the master. So, in the case of a purchase of goods by a servant the natural conclusion is, that the vendor gives credit to the principal, and that the servant is a mere agent for him in making the bargain,—unless, that is, such inference be rebutted by proof, that on former occasions the servant has been authorized to deal for ready money only, from which circumstance it would follow, that he had no power to pledge the credit of his principal at all.(a) And in like manner, where it appeared that A. had agreed, in writing, to pay the rent of certain tolls which he had hired, “to the treasurer of the commissioners,”—it was held, that no action for such rent could be maintained in the name of the treasurer, because the meaning of the contract was, that the defendant should pay the commissioners through the medium of their officer, and such being the case, they were the only persons who could sustain the action.(b)

But where the agent has any beneficial interest in the performance of the contract, as for commission or the like; or where, instead of having a bare custody of goods which he is employed to

(a) Per Holt, C. J., Show. 95.

(b) Pigott v. Thompson, 3 Bos. &amp; Pal. 147. 150.

sell or purchase,—as is the case with a servant or shopman.—he has a special property therein, or a lien thereon in respect of his commission and advances,—in such a case he may support an action in his own name, for the price or non-delivery of the goods, or for the non-fulfilment of the contract.(c)

Accordingly it is now well settled, that where a factor, although known to be such, sells goods in his own name on \*behalf of his principal, he may bring an action for the value there- [ \*242 ] of;(d) and it has been held, further, that even where by the sale note the contract appears to have been made by the factor for his principal, yet if the factor declare thereon as on a contract made with himself, this will be no variance.(e) But still it would appear, that if the contract, on the face of it, purported to be made by the factor as the agent of a third person, he could not sue thereon as principal, without giving notice to the other contracting party that he was the person really interested.(f) Again; it is clear that where a factor sells goods in his own name, he is a good petitioning creditor against the purchaser,—because, being in a situation to sue the purchaser for the price in an action for goods sold and delivered, and having therefore a legal debt due to him, it follows, that he may sue out a commission of bankrupt against the debtor.(g) In like manner, where goods are consigned to a factor for sale, and there is evidence of an intention on the part of the consignor, to vest the property therein in the factor from the time of their being delivered to the carrier, the possession by the factor of the bill-of-lading, whereby the goods are made deliverable to him, will give him such a special property therein, as to intitle him to sue the carrier in *assumpsit* for their non-delivery.(h) And so, on the other hand, where a factor ships goods as agent for his principal, and pays the freight for them at the port of shipment, he may maintain an action, in his own name, against the owner of the ship, for not delivering the goods according to the bill-of-lading.(i) But if the freight be not \*paid by the factor, and the goods are stated in the [ \*243 ] bill-of-lading to be shipped by order and on account of the consignee, then the latter only can maintain an action for their non-delivery,—because the bill-of-lading in this latter case does not, as in the former, establish any privity of contract between the owner and the factor.(k)

And it is said that, in cases like the above, it makes no difference whether the factor acts under a commission *del credere*, or not.(l)

Again; as in the cases which have just been considered we have seen that the factor, although known to be acting as such, has still the right to sue third parties on contracts made with them in that capacity: so it follows, *a fortiori*, that he possesses this right, wherever he

(c) See, per Lord Loughborough, *Williams v. Millington*, 1 H. Bl. 81. 84; see also, 3 Chitty on Com. & Man. 310; and 1 Chitty on Pl. 7.

(d) Per Lord Hardwicke, *Snee v. Prescott*, 1 Atk. 245. 248; per Lord Alvanley, *Houghton v. Matthews*, 3 Bos. & Pul. 485. 495; per Eyre, C. J., *Atkyns v. Amber*, 2 Esp. 493; and per Bayley, J., *Sargent v. Morris*, 3 B. & Al. 277. 281, (5 E. C. L. R.)

(e) *Atkyns v. Amber*, *supra*.

(f) *Bickerton v. Burrell*, 5 M. & Sel. 383.

(g) Per Lord Ellenborough, *Sadler v. Leigh*, 4 Camp. 195.

(h) *Anderson v. Clark*, 2 Bing. 20, (9 E. C. L. R.)

(i) *Joseph v. Knox*, 3 Camp. 320.

(k) *Brown v. Hodgson*, 2 Camp. 36; *Joseph v. Knox*, *supra*.

(l) Per Lord Alvanley, *Houghton v. Matthews*, *supra*.

is the only known and ostensible principal, and consequently, in contemplation of law, the real contracting party.<sup>(m)</sup> Nor, as it appears, will even the renunciation of the contract by the actual principal, affect the factor's rights in this respect; but he will still be intitled to sue the party with whom he has contracted, for any damages which he may have sustained by reason of a breach of contract by the latter. This proposition is proved by the following case. The plaintiffs, being factors, and authorized by one H. to buy for him a quantity of oil, employed B., an oil broker, to make such purchase for them. The defendant afterwards agreed with B. to sell the oil to the plaintiffs; and bought and-sold notes, signed by B., were thereupon sent by him to the plaintiffs and defendant respectively, in which notes the goods were stated to have been "Bought for Messrs. Short, Brown, and Bowyer, (the plaintiffs,) of Mr. W. F. Spackman," (the defendant,) [ \*244 ] on certain terms therein specified. The plaintiffs sent a \*corresponding bought-note to H., their principal; and they afterwards, under a general authority from him, sold the goods for his account, through another broker, to B. & Co. The bought-and-sold notes, in this latter transaction, mentioned the plaintiffs and B. & Co. as the buying and selling parties. On this sale being communicated to H., he returned the sold-notes which had been sent to him, declaring that he would have nothing to do with the oil either as purchaser or seller; and to this the plaintiffs assented. The defendant afterwards refused to deliver the oil in pursuance of his agreement; and the plaintiffs, being unable to fulfil their engagement with B. & Co., were obliged to pay them a sum of money in satisfaction, the market having risen since the time of making the last mentioned contract. The plaintiffs thereupon brought their action against the defendant for not delivering the goods, and the court held that they were intitled to recover,—notwithstanding the renunciation of the contract by H., and the acquiescence of the plaintiffs therein,—because on the face of the contract it appeared that the plaintiffs had purchased as principals.<sup>(n)</sup>

It has likewise been said, that where a factor, in entering into a contract, has exceeded his authority, so as, in fact, to have thereby made himself a principal, he may sue on such contract.<sup>(o)</sup>

Further; it was held by Lord Mansfield, and, as it seems, is admitted at the present day, that where a man pays money by his agent which ought not to have been paid, the agent may bring an action to recover it back.<sup>(p)</sup> And accordingly, where a factor residing in [ \*245 ] this country had, as the agent of a merchant resident abroad, \*effected an insurance on goods at and from a port in Russia to London,—which insurance was in fact made after the commencement of hostilities by Russia against this country, but before intelligence of that fact had arrived in London,—and the ship was afterwards seized and confiscated; it was held, that the factor

(m) See Story, Com. on Agency, §§ 393, 396.

(n) *Short v. Spackman*, 2 B. & Ad. 962, (22 E. C. L. R.)

(o) 3 Chitty on Com. & Man. 210.

(p) *Stevenson v. Mortimer*, Cowp. 806, 806; see also Paley on Prin. and Agent, by Lloyd, (Law Library); Smith's Merc. Law, 117, (Law Library); and 3 Chitty on Com. & Man. 210.

was intitled to sue in his own name for a return of premium, inasmuch as the policy had never attached.(q)

If, however, nothing more appears than the mere fact, that in making the contract in question the factor acted as the ostensible principal, this will give him only a qualified right to sue on such contract, and the principal will still have the power of superseding the factor's right, by suing in his own name, or by taking any other proceedings whereby it becomes manifest that he intends to consider the other contracting party as his debtor. Thus, if a factor sells goods in his own name, without disclosing his principal, and before he has sued the vendee for the price, the latter takes steps for recovering the debt directly from the vendee, such debt will then be considered to be due to the principal, in the same manner as if the sale had been made personally by him in the first instance, and after the intervention of the principal the factor will cease to have any right to sue.(r) So, if before payment to the factor, the principal give the vendee notice to pay the debt to him and not to the factor, the factor's right to sue for such debt will be extinguished;(s) and *a fortiori*, will this right be extinguished if, before the factor makes his claim, the principal has already been paid the price of the goods,(t) or if the debt has in any other manner been discharged.

\*And the same rule applies with equal force to all the [ \*246 ] other cases in which as we have seen, the factor has a right to sue. Thus it is well established, that where a contract, not under seal, is made with an agent in his own name for an undisclosed principal, the latter as well as the former may sue upon it;(u) so it is clear, that if money have been paid by a factor on a consideration which has failed, his principal may bring an action for the recovery thereof;(x) and hence it follows, that in these cases also the factor's right to sue is a qualified right merely, being subject to be defeated by the intervention of the principal at any time prior to its having been actually enforced. Indeed, although the factor, under such circumstances as the above, has a legal right to sue as well as his principal, still, as has been well observed, he sues merely as a trustee for his principal;(y) and such being the case, it is evident that his right to sue can exist, only so long as his *cestui que* trust refrains from exercising that right in his own person.

But still it must be borne in mind, that the rights both of the principal and of third parties with reference to the question of which we are now treating, are subject to the following limitations in favour of the factor, namely,—that where the factor has a lien on goods intrusted to him for sale, and which he has sold pursuant to that trust, such lien, as we have seen, attaches on the price of the goods when sold, so as to intitle him to insist on payment to himself to the extent of his lien, even in opposition to his principal;(z) and it appears further, that if,

(q) *Oorn v. Bruce*, 12 East, 225.

(r) *Sadler v. Leigh*, 4 Camp. 195.

(s) *Drinkwater v. Goodwin*, Cowper, 251. 255; *Buller*, N. P. 130.

(t) *Coppin v. Walker*, 7 Taunt. 237, (2 E. C. L. R.); *Hornby v. Lacy*, 6 M. & Sel. 172,

(u) Per Lord Denman, *Sims v. Bond*, 5 B. & Ad. 389. 393, (37 E. C. L. R.)

(x) Per Lord Mansfield, *Stevenson v. Mortimer*, Cowp. 806.

(y) *Smith's Merc. Law*, 117, (Law Library.)

(z) *Drinkwater v. Goodwin*, Cowp. 251. 255; *Hudson v. Granger*, 5 B. & Al. 97, (7 E. C. L. R.); *Warner v. McKay*, 1 M. & W. 391.(\*)

before the intervention of the principal, the other contracting party have notice of the factor's claim, he will thenceforth hold the price of [ \*247 ] the goods subject \*to that claim, and be compelled to discharge it before paying the principal.(a) It appears however, to be taken for granted, that in such cases, third parties are intitled to an offer of indemnity from the factor;(b) and it is believed that, in practice, such indemnity is usually offered; although, whether this be absolutely essential in order to the security of the factor's rights, may admit of question.(c) At all events if, after such notice and offer of indemnity the purchaser pay the principal, the payment so made will not be available as a defence to an action by the factor.(d)

Lastly: we have seen that where a factor acts under a commission *del credere*, he is regarded as a surety to his employer for the solvency of those with whom he contracts on his behalf;(e) and it follows therefore, from the nature of the relation between principal and surety, that in such cases the factor's employer cannot interfere with the rights of the former against the person for whom he is surety—except by suing him,—without at the same waiving the factor's guarantee. If therefore he accept payment from the principal debtor, or discharge the debt by taking something as a compensation therefor, or by giving a release, or accepting a fresh security, in all these cases the factor will likewise be discharged from his liability as surety.(f) And so, it appears, that any alteration in the terms of credit, without the consent of the factor;(g) or the fact of the principal having entered into any [ \*248 ] binding agreement with \*the debtor, to refrain from taking proceedings against him, will have the like effect.(h)

Secondly; as to the cases in which a factor is considered to have an absolute right to sue third parties, on contracts made with them in that capacity.

These cases appear to be two in number. First it is said;—that where a factor to a person beyond sea buys or sells goods for the principal in his own name, an action will lie against him or for him in his own name; for the credit will be presumed to be given to him in the first case, and, in the last, the promise will be presumed to be made to him,—and the rather so, as it is much for the benefit of trade:(i) and in like manner it has been ssid; that where the principal resides abroad, he is presumed to be ignorant of the circumstances of the party with whom his factor deals, and that therefore the whole credit is considered as subsisting between the contracting parties.(k) It thus appears that, in the case of foreign factors, exclusive credit is considered to be given both by and to them in all their dealings in that capacity; and it has accordingly become the received opinion, that they alone are intitled to maintain actions on contracts which

(a) 3 Chitty on Com. & Man. 211; Drinkwater v. Goodwin, *supra*.

(b) Per Lord Mansfield, Drinkwater v. Goodwin, *supra*.

(c) See the remarks of Dr. Story, Com. on Agency, p. 365, note 1.

(d) Drinkwater v. Goodwin, *supra*.

(e) *Ante*, pp. 98, 99.

(f) Jones v. Lewis, 4 B. & C. 506, (10 E. C. L. R.); 1 Pothier on Obligations, part 2, c. 6, s. 1, by Evans.

(g) Bacon v. Chesney, 1 Stark. 163, (3 E. C. L. R.)

(h) Coombe v. Woolfe, 8 Bing. 156, (21 E. C. L. R.)

(i) Gonzalez v. Sladen, Bull. N. P. 130.

(k) Per Chambre, J., Houghton v. Matthews, 3 Bos. & Pal. 485, 490.

have arisen out of such dealings.(l) "This doctrine," says an eminent authority, "is in conformity to the general usage of trade; and it was, in all probability, originally derived from it, as affording a just exposition of the intentions of all parties, and as being founded in public policy and expedience, and in the safety, if not the necessities of commerce."(m)

\*The other case in which a factor is held to possess an absolute right to sue third parties, on contracts into which [ \*249 ] the latter have entered with him in that capacity, is where he has a lien on the price of the goods sold,—either in respect of those goods in particular, or for his general balance—to an amount equal to, or greater than the value of such goods. This rule indeed follows as a corollary to that which has been already stated, with reference to the factor's rights in those cases where he has a lien on the price of the goods to an amount equal to part of their value only; for, as in the latter case we have seen that he is intitled to insist on payment to himself to the extent of his lien, even in opposition to his principal, so it is evident that, the extent of his lien in the former being equal to the whole value of the goods, he must in that case be intitled to insist on payment to himself of the entire price.(n) If therefore the debtor have notice of the factor's lien, a payment made by him to the principal, after such notice, will be no defence to an action by the factor for the price of the goods.(o)

And it appears that, in such a case, the debtor will not be allowed to avail himself, as against the factor, of any claim of set-off which he may have against the principal. "The factor," says Lord Mansfield, "has a right to bring an action against the buyer to compel the payment; and it would be no defence to that action to say, that, as between him and the principal, he (the buyer) ought to have that money because the principal is indebted to him in more than that sum; for the principal himself can never say that, but where the factor has nothing due to him."(p)

\*In determining how far the rules stated above, with reference to the right of a factor to sue in his own name [ \*250 ] on contracts made by him for his principal, are applicable to the case of a broker, properly so called, we must again have recourse to the distinction which has been already so frequently mentioned as existing between the characters of these two classes of agents. It will be remembered then, that the rule as to the factor's right in this behalf was thus stated:—that where a factor, although known to be such, sells goods in his own name on behalf of his principal, he may bring an action for the value thereof;(q) and in like manner it will be found, on referring to all the cases which we have adduced in illustration of this rule, that, whatever might be the nature of the contract itself, and whether the principal were disclosed or not, it was still necessary in order to the possession by the factor of the right of suing thereon

(l) 3 Chitty on Com. & Man. 203; 1 Bell's Com. on Mer. Jur. § 209; Story's Com. on Agency, § 400.

(m) Story, ut supra.

(n) Drinkwater v. Goodwin, Cowp. 251. 256; Hudson v. Granger, 5 B. & Al. 27, (7 E. C. L. R.)

(o) Coppin v. Walker, 7 Taunt. 236, (2 E. C. L. R.)

(p) Drinkwater v. Goodwin, supra; and see Atkyn v. Amber, 2 Esp. 493.

(q) Ante, p. 241.

in his own name, that the contract on which he sued should have been made by him in his own name. Applying this principle then to the case of a broker, we shall find that, in general, he cannot possess the right in question. He is not, as we have seen, at liberty, under ordinary circumstances, to contract in his own name;(r) and hence it follows, that, under ordinary circumstances, he possesses no right of suing in his own name on any contract made by him in his representative capacity.

With reference to insurance-brokers however, the case is otherwise. In the ordinary form, a policy of insurance on ship and goods runs thus:—"A. B. (the broker) as well in his own name, as for and in the name and names of all and every other person and persons to whom the same doth, may, or shall appertain, in part or in all, doth make assurance and cause himself and them and every of them to be insured;"(s) and, in accordance with this form of policy, [ \*251 ] the practice has now become usual, to allow the insurance broker to sue thereon in his own name,(t) whether, in the particular case, he has acted under a commission *del credere* or not;(u) nor, as it seems, will he be debarred from maintaining this action, even although it be averred in the declaration that he was interested in the policy jointly with another person;(x) nor although it be made to appear, that at the time the policy was effected he had no authority from his principal to effect the same, provided the latter have ratified his act before action brought.(y)

But still the broker does not possess an absolute right to sue on the policy,—inasmuch as his right in this respect is liable to be superseded by the principal bringing an action in his own name,(z) unless, that is, the policy be under seal;(a) and although, where it is under seal, the broker alone can sue thereon, still, even here, he sues merely as a trustee for his principal.(b)

An insurance-broker however has, as we have seen, a lien for his general balance on policies remaining in his hands. And it would seem to follow from this circumstance, first, that he, like a factor, will have the right to insist on payment to himself to the extent of his lien, of any sum of money which may become due on such policies, even in opposition to his principal; and secondly, that where the debt for which he claims his lien is equal to or greater than the sum payable on the policy, his right to sue thereon will be absolute.

[ \*252 ] \*2. Let us now consider, in the second place, the right which a factor or broker possesses to sue third parties for wrongs of which the latter may have been guilty towards him in the course of his agency.

First then, it is clear, that where a factor or broker has the actual

(r) *Baring v. Corrie*, 2 B. & Al. 137. 143.

(s) 2 Park on Mar. Ins. Appendix, No. 1, p. 988, 8th ed.

(t) Per Bayley, *J. Sargent v. Morris*, 3 B. & Al. 277. 281, (5 E. C. L. R.); and see *Garrett v. Handley*, 4 B. & C. 664. 666, (10 E. C. L. R.); and 2 Park on Mar. Insur. 848. 8th edit.

(u) *Paley on Agency*, by Lloyd, 362, (Law Library.)

(x) *Cosack v. Wells*, cited 1 Chitty on Plead. 7, note (a.)

(y) *Hagedorn v. Oliverson*, 2 M. & Sel. 485.

(z) *Sargent v. Morris*, and *Garrett v. Handley*, *supra*.

(a) 3 Chitty on Com. & Man. 211; *Paley on Agency*, *supra*.

(b) *Gibson v. Winter*, 5 B. & Ad. 96, (37 E. C. L. R.)

possession of property belonging to his principal, he may maintain an action of trespass or trover for any tort committed by a third party, whereby such possession is affected; (c) and it would appear, that even if the custody of the factor or broker in the particular case were that of a mere depositary for the benefit of his principal,—he having no lien on the property for commission or advances so as to give him a beneficial interest therein,—he would still be intitled to maintain these actions, especially if he himself were liable over to his principal for the damages sustained by reason of the wrong complained of. (d)

Again: although an opinion was formerly entertained to the effect, that in all cases in which a person had merely a special property in goods, it was necessary, in order to his maintaining trover therefor, that he should once have had the actual possession thereof, (e) yet the law seems now to be otherwise,—it being well settled by a number of recent decisions, that where goods have been consigned to a factor, under circumstances which show that it was the intention of the consignor to vest the property therein in the factor from the time of shipment, the latter may maintain trover against any one who wrongfully withholds the possession of such goods from him, even although he has never actually received them. (f) This rule is illus- [ \*253 ]

T., a corn merchant at Longford,—who had been in the habit of consigning cargoes of corn to the plaintiffs, as his factors for sale, and obtaining acceptances from them on the faith of such consignments,—obtained from the master of a canal-boat a receipt signed by him for a full cargo of oats, therein stated to be shipped on board such boat deliverable to the agent of T. in Dublin, in care for and to be shipped to the plaintiffs at Liverpool. At the time the above receipt was obtained, the boat was actually loaded. T. thereupon inclosed the receipt to the plaintiffs, and drew a bill on them against the value of the cargo, which bill the plaintiffs afterwards accepted and paid. Prior to the acceptance of the bill by the plaintiffs, W., an agent of the defendant who was T.'s factor for sale in London, arrived at Longford and pressed T. for security for previous advances. T. accordingly gave W. an order on his agent in Dublin, to deliver to W. the aforesaid cargo of oats so soon as it arrived there; and under this order W. afterwards took possession of the said cargo for the defendant. The plaintiffs thereupon brought trover for the oats, and the court held that,—inasmuch as from the whole of the evidence it was clear that the intention of the consignor was to vest the property in the consignees from the moment of its being delivered to the carrier,—they were intitled to recover. (g) And in like manner, where one C., a manufacturer at Newcastle, consigned goods to E. & Co. his factors in London, specifically to meet a bill drawn upon them, and at the same time transmitted to them a receipt, signed by the

(c) See per Eyre, C. J., *Fowler v. Down*, 1 Bos. & Pal. 47; 1 Chitty on Pl. 61; 3 Chitty on Com. & Man. 210; Story on Bail. § 150.

(d) See per Chambre, J., *Sutton v. Buck*, 2 Taunt. 302; *Rooth v. Wilson*, 1 B. & Al. 59; and see per Best, C. J., *Burton v. Hughes*, 2 Bing. 173. 175, (9 E. C. L. R.)

(e) Per Eyre, C. J., *Fowler v. Down*, *supra*.

(f) Per Eyre, C. J., *Fowler v. Down*, *supra*; and see the cases cited *infra*.

(g) *Bryans v. Nix*, 4 M. & W. 775. (\*)



mate of the vessel, acknowledging the goods to have been received on board to be delivered to E. & Co.:—it was held, that E. & Co. [ \*254 ] had a sufficient property in and right to the possession \*of the goods, to intitle them to maintain trover against a wrong-doer, who sought to withhold such possession from them.(h)

And it appears, that if it be manifest that the intention of the consignor was to vest the property in the goods in the consignee from the time of the shipment, it will be wholly immaterial whether the instrument by which this intention is proved be a bill of lading or not,—as it may equally be proved by means of a carrier's or wharfinger's receipt, or by correspondence alone.(i)

But if there be no evidence of such an intention on the part of the consignor, then the factor will not be intitled to maintain trover in order to obtain possession of the goods. Thus, if the principal when he consigns goods to his factor for sale be merely in a course of drawing on the factor, without there having been any acceptance of bills by the latter on account of the particular cargo, this circumstance, although it might give the factor a right to detain the goods when they came to his hands, will not intitle him to anticipate the possession, by bringing trover for them against the agent of the unpaid vendor, to whom they have meanwhile been delivered.(k) So, although the factor may have accepted bills expressly on account of a particular consignment of goods, yet, if at the time the carrier signs the receipt for such goods, there have been in fact no goods of the kind mentioned, delivered to him or otherwise specifically appropriated to the factor, and the consignor afterwards alters the destination of the goods, the factor will not be intitled to maintain trover for them.(l) And in like manner, if the principal draw bills on his factor in anticipation of a particular cargo, and, before the cargo is loaded, the [ \*255 ] latter \*accept such bills, but the principal, instead of sending the bill of lading to him, sends it to a third party with instructions to sell the cargo for his (the principal's) account, possession of the bill of lading afterwards acquired by the factor as the agent of such third party, will not intitle him to sue the latter in trover, in order to obtain possession of the cargo.(m)

So it appears, that the indorsement of a bill-of-lading of goods by the principal to his factor without consideration, and merely for the purpose of enabling the factor to take possession of the goods, in order to secure to the principal the amount of a bill drawn by him on a third party to whom the goods have been consigned, will not give the factor a right to bring an action of trover for them in his own name;(n) nor will such an indorsement of the bill-of-lading to a factor, in order to authorise him to stop the goods *in transitu* on account of his principal, intitle him to maintain trover for them in his own name, unless it appear that he actually demanded the goods before the right of stoppage *in transitu* was at an end;(o) but it has been held, that if the

(h) *Evans v. Nichol*, 4 Scott, N. R. 43.

(i) *Bryans v. Nix*, *supra*.

(k) *Patten v. Thompson*, 5 M. & Sel. 350.

(l) *Bryans v. Nix*; *Evans v. Nichol*, *supra*.

(m) *Bruce v. Wait*, 3 M. & W. 15.(\*)

(n) Per Lord Ellenborough, *Coxe v. Harden*, 4 East, 211. 217.

(o) *Waring v. Cox*, 1 Camp. 363; and see the remarks of the Court of Common Pleas on this case in *Morison v. Gray*, *infra*.

factor make such demand before the right of stoppage *in transitu* is determined, he will be intitled to bring trover in his own name for the goods, although the bill-of-lading was indorsed to him without consideration and for the mere purpose of enabling him to exercise that right.(p)

Again: a factor may sue in his own name to recover for any damages which he may have sustained in the course of his employment, by reason of the fraud or misrepresentation \*of third persons. [ \*256 ] Accordingly it is said, that if a factor were authorised to buy goods for his principal of one particular quality only, and the seller of such goods were fraudulently to represent them to be of that quality,—whereas they were not,—and the principal were to refuse to receive them, or the factor were to be otherwise injured by means of such misrepresentation, he would be intitled to a full recompense from the seller for the tort.(q) And in like manner it is presumed, that if a factor were to purchase a commodity by order of his principal, under circumstances from which the law would imply a warranty on the part of the vendor, that the thing bought was reasonably fit and proper for a certain purpose,(r) and the factor were to sustain any loss by reason of the breach of such implied warranty, he would be intitled to recover damages from the vendor for the loss so sustained.

And lastly: if a factor employ a sub-agent for the purpose of carrying into effect the orders of his principal, and such sub-agent, by neglecting the instructions of the factor, commits a breach of duty for which the factor is compelled to answer his principal in damages, the factor will be intitled to recover from the sub-agent the damages which he has so sustained. Thus, where a factor, having a commission from A. to ship for him a cargo of tobacco, employed B. as his broker to effect the purchase for him, and directed him to buy “Porto-Rico tobacco of the best quality;” whereupon B. purchased and shipped the tobacco, and delivered a bought-note to the factor,—in which however the tobacco was described as “Porto-Rico tobacco,” only—but A., finding the tobacco to be very bad, refused to accept it and brought an action against the factor, in which he had \*a [ \*257 ] verdict;—it was held that the factor might sue B. for the damages recovered against him in the action by A., and that his acceptance of the bought-note from B. was no waiver of the directions he had given him as to the quality of the goods to be purchased.(s)

And the measure of damages to which the factor is intitled in such a case is held to be, the damages and costs recovered in the action against him,—he, at the same time, undertaking to assign the goods to the defendant, or to sell them and account to him for the produce.(t)

(p) *Morison v. Gray*, 3 Bing. 260, (9 E. C. L. R.)

(q) *Story's Com. on Agency*, § 415.

(r) As to the cases in which the law will imply such a warranty, see *Brown v. Edgington*, 3 Scott, N. R. 496, 504, 505; *Chanter v. Hopkins*, 4 M. & W. 393(\*); 3 Bla. Com. 166.

(s) *Mainwaring v. Brandon*, 8 Taunt. 202, (4 E. C. L. R.)

(t) *Ibid.* 208.

[ \*258 ]

## CHAPTER III.—SECT. II.

## ON THE LIABILITIES OF FACTORS AND BROKERS.

## PART I.

## ON THEIR LIABILITIES TO THE PRINCIPAL.

THE next subject which presents itself to our notice, according to the arrangement proposed at the commencement of this chapter, is the consideration of those liabilities which factors and brokers may incur in the course of their employment; and in treating of these we shall pursue a course similar to that which we have adopted in treating of their rights,—directing our attention, in the *first* place, to the liabilities which they may incur to their principals; and *secondly*, to those which they may incur to third persons.

In the first place then, let us see what liabilities a factor or broker may incur to his principal; and then let us inquire into the remedies which the principal may adopt in order to avail himself of such liabilities.

We have already discussed, at considerable length, the various duties which the law holds to be incumbent on factors and brokers in the exercise of their agency, and the several powers with which it has clothed them, or which it considers them, under special circumstances, to possess, in order to their being enabled duly to perform their office; and in treating of these subjects, we have had frequent occasion to mention the liabilities which they would incur to their principals, by reason of the non-performance of such \*duties, or [ \*259 ] from being guilty of any unauthorised excess in the exercise of such powers. Such being the case then, it would appear to be unnecessary to enter into any further enumeration, in this place, of the particular instances in which the factor or broker may expose himself to liabilities of the kind referred to; and accordingly, we shall content ourselves by merely stating in general,—that wherever the factor or broker has committed, in the course of his employment, any breach of duty, or has overstepped his powers, or has been guilty of negligence or fraud, and the principal has suffered a loss in consequence of his factor's misconduct, the latter will be liable to the former to the full extent of such loss, and will likewise forfeit his commission. (a) And it may be stated, further, that mere honesty of intention on the part of the factor or broker in doing the act complained of will not be admitted, under ordinary circumstances, as an excuse for his breach of duty; (b) nor will it make any difference in his liability, that the loss in question was occasioned simply by his inadvertence, because, in the very essence of the relation between him and his principal is

(a) *Malynes, Lex Merc.* 154; *Beaves, Lex Merc.* 41. 43; *Com. Dig. Merchant, B.*; *Moore v. Mourgue, Cowp.* 479; 3 *Chitty on Com. and Man.* 215.

(b) *Com. Dig. Merchant B.*; *Catlin v. Bell, 4 Camp.* 183.

involved in a contract on his part, to the effect, that he possesses reasonable skill for the exercise of his employment; (c) and in like manner, he will be equally liable whether the negligence complained of consisted of a positive act, or of a mere omission; because, being an agent for hire, he is answerable as well for nonfeasance as for misfeasance. (d)

And not only is a factor or broker liable to his principal for his own act or default, but he is also, in some cases, \*liable for the [ \*260 ] acts and defaults of third persons. Thus, if a consign-ment of goods be made to two factors jointly, and one of them die, the other will be liable for the proceeds of the whole; and it will make no difference that the business in question was, in fact, transacted solely by the deceased. (e) So if two ship-brokers, residing at different ports, enter into an agreement to share the profits of their respective commissions, they will both be liable under this agreement, to all persons for whom either may have acted in that capacity, even although it were provided by such agreement that each of them should be liable for his own acts and losses only. (f) In like manner, if a factor or broker employ a sub-agent to assist him in transacting the affairs of his principal, he will be liable for the acts and omissions of such sub-agent. Thus, if a factor employed to purchase goods instruct a sub-agent to effect such purchase, and he purchase goods of an inferior quality, the factor will be liable to his principal in damages; (g) or if he be employed to sell goods, and he appoint a sub-agent to effect the sale and receive the price, payment of the money to the sub-agent will be sufficient to charge him with the receipt thereof. (h) And in like manner, if he deposit goods which have been intrusted to him, in the warehouse of a third person, and the goods whilst there are lost, he will have to answer for them to his principal, unless he is in a situation to show that he exercised reasonable and proper care in the choice of such place of deposit. (i) Dr. Story indeed is of opinion, that where it becomes necessary or is usual for the agent to employ a sub-agent, the former will, in no case, be responsible for the negligence or misconduct \*of the latter, unless it appear that he has not [ \*261 ] used reasonable diligence in his choice as to the skill and ability of the sub-agent; but that the sub-agent himself will, in such cases, be alone responsible to the principal for his own negligence or misconduct; (k) and in support of this opinion he cites the cases referred to below. (l) But with all deference to so high an authority, it is submitted, that the effect of those cases is merely to show, that although, under ordinary circumstances, the appointment by an agent of a sub-agent will create no privity between the latter and the principal, yet that cases may occur in which the existence of such privity

(c) *Chapman v. Walton*, 10 Bing. 57, (25 E. C. L. R.); *Sears v. Prentice*, 8 East, 348; *Denew v. Daverell*, 3 Camp. 451; *Shiells v. Blackburn*, 1 H. Bla. 159, 162, 163.

(d) *Coggs v. Bernard*, 2 Ld. Raym. 919; *Else v. Gatward*, 5 T. R. 143.

(e) *Holliscomb v. Rivers*, 1 Ch. Ca. 127; *Godfrey v. Saunders*, 3 Wils. 73.

(f) See *Waugh v. Carver*, 2 H. Bla. 235.

(g) See *Mainwaring v. Brandon*, 8 Taunt. 202, (4 E. C. L. R.)

(h) See per Lord Kenyon, *Matthews v. Haydon*, 2 Esp. 509, 510.

(i) *Goswill v. Dunkley*, Stra. 680.

(k) Com. on Agency, 201.

(l) *Bromley v. Coxwell*, 2 Bos. & P. 438; *Goswill v. Dunkley*, *supra*; *Solly v. Rathbone*, 2 M. & Sel. 298; and *Cockran v. Irlam*, *ibid.* 301.

will be presumed; and that as, in the former case, the principal could not sue the sub-agent because no privity existed between them,<sup>(m)</sup> so, in the latter, he might sue him by reason of the presumed existence of such privity. This however would seem to prove, not that where necessity or custom invests an agent with authority to appoint a sub-agent, the principal will be taken to have waived his right to sue the former, but that under such circumstances he will acquire the additional right of suing the latter, if he elect so to do; and this without reference to the question, whether the agent, in choosing the sub-agent, has exercised proper care or not.

But still it appears, that if the principal, with full knowledge of the facts, adopt the acts of the sub-agent, the latter will then become the immediate representative of the principal, and the agent by whom he was appointed will cease to be responsible. Where therefore a broker, who had been instructed to effect an insurance, being unable to effect it himself, employed another broker for that purpose; and the latter [ \*262 ] effected the insurance, kept possession of the \*policy, and afterwards received from the underwriters the amount of a loss which had happened thereon; whereupon the principal, with full knowledge of these facts, applied to the sub broker for payment of the money so received by him, but afterwards, on his becoming bankrupt, brought an action against his own broker for the recovery thereof; it was held, that he could not maintain such action, because if he had intended to insist on his right to have the money from his own broker, he should never have looked to the other broker at all.<sup>(n)</sup>

It will at once be seen, that the liabilities which we have mentioned above are such as may exist in every case in which a factor or broker is employed, and moreover, that they are such as necessarily arise out of the very relation in which those agents stand to their principals. The liabilities of a factor or broker to his principal, however, are not limited to those of the above description only; nor can they be in all cases measured, simply by a reference to the duties which he ought to perform, or the powers which he possesses in that capacity; but they may be enlarged or varied almost to any extent, either by the agreement of the parties or by the act of the agent himself. Where, therefore, such an agreement exists, it must be taken as the index of the agent's liability; and so, where he has done any act to enlarge his liability, he will be held to be answerable to his principal to the full extent of such enlarged liability, whether, had he merely done his duty or exercised his powers in the usual way, he would have been liable to that extent or not. Thus, although, under ordinary circumstances, a factor who sells goods in pursuance of his instructions is not liable to the principal for the price thereof, until he has actually received it from the buyer, yet it is clear, that if he have agreed with his principal to sell on a commission *del credere*, he will be liable to [ \*263 ] him for the price of the goods sold under that \*commission whether he himself have received it or not.<sup>(o)</sup> So, if a factor who is employed to sell goods, sells them on the terms of

(m) *Stephens v. Badcock*, 3 B. & Ad. 354, (23 E. C. L. R.)

(n) See *Smith v. Colgan*, 2 T. R. 188, 189, *in notis*.

(o) *Morris v. Cleasby*, 4 M. & Sel. 574; ante 2.

payment by a bill at a certain date, and then draws a bill on the buyer for the amount, which bill he remits to his principal,—he will be answerable to the latter thereon, even although he may not have a commission *del credere*.(p) In like manner, if a factor, upon selling goods, takes a security from the purchaser, payable to himself, and without disclosing to his principal the name of the purchaser, remits to him his own promissory note for the proceeds, and the purchaser becomes insolvent before paying the factor for the goods,—the factor in such a case will be considered to have taken upon himself the responsibility of the purchaser, and will be liable on the note given by him to his principal.(q) So, if an insurance-broker debit the underwriter with a loss, and then take his acceptance for the balance of the general account between them,—which acceptance is made payable at a date later than that at which the loss would have been payable in cash,—the assured may sue the broker as for money had and received, although he has not in fact received the money from the underwriter,—inasmuch as, by his having taken the bill from the underwriter he has deprived the assured of his immediate remedy against him ;(r) and for a like reason it is held, that if the insurance-broker receives credit in account with the underwriter for a loss, and then erases the name of the underwriter from the policy, his principal may maintain an action against him for money had and received, to recover the amount of such loss, although it has never been actually paid to him.(s) Again; if a factor or broker purchase foreign bills for his principal and indorse them to him without \*qualification, [ \*264 ] he will be liable to the principal on such indorsement, however small be the commission which he gets on the purchase ;(t) and in like manner, if goods are consigned to joint factors for sale, but, before the goods are sold, they dissolve partnership, and the commission to sell is thereupon assumed by one, that one will be liable to the principal in an action for money had and received to recover the proceeds of the sale.(u)

Having thus taken a general view of the liabilities of factors and brokers to their principals, we now proceed, secondly, to state by means of what remedies these liabilities may be enforced; and,—in order that we may judge with some degree of accuracy of the extent to which the principal may avail himself of such remedies,—we shall then state, briefly, the nature of the damage which it will be necessary for him to prove in order to fix the liability of the factor or broker, as well as the several defences of which the latter may avail himself, in answer to any action which his principal may bring against him for that purpose.

1. Where the breach of duty of which the factor or broker has been guilty, relates to some matter of account between him and his principal, the latter may adopt, according to circumstances, some one of the following remedies. First, where the principal wants an account and cannot give evidence of his right without it, there, it is

(p) *Le Ferre v. Lloyd*, 5 Taunt. 749, (1 E. C. L. R.)

(q) *Simpson v. Swan*, 3 Camp. 291. (r) *Wilkinson v. Clay*, 6 Taunt. 110, (1 E. C. L. R.)

(s) *Andrew v. Robinson*, 3 Camp. 199.

(t) *Goupy v. Harden*, 7 Taunt. 160, (2 E. C. L. R.)

(u) *Wells v. Ross*, 7 Taunt. 403, (3 E. C. L. R.)

said, the action of account is the proper remedy.(x) But the mere circumstance of there being long complicated accounts between him and his factor or broker will not, of itself, compel him to have recourse to this action; for, however numerous the transactions between the parties may have been, still there can be no doubt,—notwithstanding [ \*265 ] some dicta to the \*contrary,(y)—that if, upon dissecting the account, there appears to be money due upon certain items, an action for money had and received will lie.(z)

Again; it is said that wherever one acts as bailiff, he promises to render an account;(a) and accordingly it has been held, that where goods are consigned to a factor for sale, the law will imply a promise on his part to account for such as are sold, to pay over the proceeds, and to deliver the residue unsold on demand; (b) or that, if a man be employed as a broker, a like promise will be implied from him, to be at all times ready to render a full and clear account of his transactions.(c) If therefore the factor or broker should neglect or refuse to furnish his principal with such an account, the latter may bring a special action of *assumpsit* against him for the breach of this implied promise; and it is said, that the remedy by such action will be found very convenient, particularly where the principal is unable to furnish the evidence necessary to support an action of *indebitatus assumpsit* or *trover*,—as, for instance, where he is unable to prove how the goods or money intrusted to the agent have been disposed of, or that, if disposed of, he has received the proceeds.(d)

In such cases as the above, however, a preference has of late years been given to the mode of proceeding by bill in equity in order to compel an account; and this mode of proceeding is attended with very considerable advantages, particularly by this,—that it gives the principal an opportunity of obtaining a discovery, on the oath of the [ \*266 ] agent, of \*the mode in which he has acted in the execution of his agency;(e) at the same time that it affords an opportunity, by having the account taken before a master in chancery, of investigating long and intricate transactions, with a degree of minuteness which the hurry of *Nisi Prius* would altogether preclude. It is said, moreover, that wherever the relation of principal and agent exists, the former may file a bill against the latter for an account;(f) and hence it would appear, that the principal may avail himself of this remedy without reference to the question, whether the particular case was a proper one for investigation in a court of law or not.(g)

(x) Per Gibbs, C. J., *Tomkins v. Willehear*, 5 Taunt. 431, (1 E. C. L. R.)

(y) See *Scott v. M'Intosh*, 2 Camp. 238. 240.

(z) *Ibid.*; and see per Dampier, J., *Arnold v. Webb*, reported 5 Taunt. 432, note (a), (1 E. C. L. R.)

(b) *Topham v. Braddick*, 1 Taunt. 572.

(c) See *Chitty on Contracts*, 486; 2nd edition.

(d) Per Sir John Leach, V. C., *Mackenzie v. Johnston*, 4 Madd. 373. 375.

(e) *Ibid.*; and see per Sir John Leach, V. C., *Masey v. Banner*, 4 Madd. 413. 417; and *Dinwiddie v. Bailey*, 6 Ves. jun. 141, note 94.

(f) The learned editor of Mr. Paley's "Treatise on the Law of Principal and Agent," appears to have fallen into an error on this subject. He states, that "the bare relation of principal and agent is not sufficient to intitle the former to relief in equity, if the matter can be fairly tried at law." (Paley on Agency, by Lloyd, 59, note (m), (Law Library); and in support of this opinion he quotes the cases of *Spencer v. Spencer*, 2 Y. & Jer. 249, (\*) *Frietas v. Dias Santos*, 1 Y. & Jer. 575 (\*) and *Cooper v. Hatton*, 13 Price, 502, (3 E. Ex.

Indeed the remedy by bill for a discovery and account \*may be adopted by the principal, in aid of a proceeding [ \*267 ] against his factor or broker by action at law. Thus, if the factor or broker have been guilty of misconduct in the course of his agency, and the principal brings an action at law in order to recover compensation for the damage he has sustained by reason of such misconduct, he will likewise be intitled in equity to a full discovery of all the transactions in the course of which the agent has misconducted himself, as well as of all books containing entries relative to those transactions, on a bill filed for that purpose which alleges, that he requires such discovery for the purpose of enabling himself to give evidence in the action at law. And in one case a London broker was compelled to answer such a bill, even although it appeared that the discovery prayed would subject him to the penalty of the bond given by him to the corporation of that city on his admission.(h)

But if the principal can so fashion his claim as to reduce it to a mere money demand, then an action of *assumpsit* or debt, as for money had and received to his use, is the proper remedy. Thus, if the factor have sold the goods intrusted to him, and received the proceeds, money had and received will lie; and so, it appears, that this action will lie even although there be no evidence that the factor has received such proceeds, provided he has refused to account for the same within a reasonable time,—because, under such circumstances the presumption is, that he has actually sold the goods and received the proceeds in money.(i) So if goods are placed in the hands of a factor for sale, and he indorse the bill of lading to a sub-agent, with instructions to him to sell such goods, which he does and receives the proceeds, it appears that the principal may sue the sub-agent as for money had and received to his use.(k) In like manner, [ \*268 ] \*if a factor sell goods for his principal, and become bankrupt before payment, and his assignees afterwards receive the money for them, the principal may recover it from them in an action for money had and received;(l) and so, if the factor on such a sale take payment from the vendee in notes which are made payable to himself at a future day, and his assignees afterwards receive the money due on the notes, the principal will be intitled to recover it from them in an action for money had and received.(m) But if the factor had received the money before his bankruptcy, and it had not been laid out by him in the purchase of any specific thing so as to distinguish it from the rest of his estate, the action for money had and received

R.) The first of these cases, however, was that of a bill by one partner against his co-partners, and not that of a bill by a principal against his agent; and in the other two the question was, not whether a bill for an account might be brought by a principal against his agent, but whether, after an action at law had been so brought, the agent was intitled to bring a bill for a general account of his dealings with the principal, and for an injunction to restrain the latter from proceeding with his action; and in both cases it was held, that the agent had no such right, because there was nothing alleged in his bill which could not have been given in evidence as a defence to the action at law. These cases therefore, do not appear to support Mr. Lloyd's opinion; and as the author has not been able to discover any others which do, he is inclined to regard the *dicta* of Sir John Leach stated in the text, as containing the true doctrine on the subject in question.

(A) *Green v. Weaver*, 1 Sim. 404. (f) *Hunter v. Welsh*, 1 Stark. 224, (2 E. C. L. R.)

(k) *Stierneid v. Holden*, 4 B. & C. (10 E. C. L. R.)

(l) *Scott v. Sarman*, Willes, 400.

(m) *Ibid.*



could not have been maintained; and the principal must have come in with the other creditors under the commission.(n) Again; if a factor or broker receive a sum of money from his principal with instructions to apply it to a particular purpose, and he refuses to apply it to that purpose, or to account for the same, an action for money had and received will lie against him.(o) So, he will be liable to this action if he applies the money to the particular purpose, after his authority so to apply it is countermanded;(p) and it would appear, that even if money were placed in the hands of a broker to enable him to pay the premiums on illegal insurances, his principal could still maintain this action in order to recover such money from him, provided it were brought at any time before he had actually paid it to the underwriters.(q) In like manner, if the factor or broker applies the money to a different purpose from that to which he was instructed to apply it, an action for money had and received will lie against [ \*269 ] him;(r) but if \*he has laid out part of the money agreeably to his instructions, and refuses to account for the remainder only, then this action will not lie, but he must be sued specially for not accounting.(s) It appears further, that in cases like these, the factor or broker will continue to be liable to his principal for the money placed in his hands, until he has either appropriated it to the purpose for which it was intended, or has, in pursuance of his instructions so to appropriate it, entered into some binding engagement with a third party in reference thereto, which would give the latter a right of action against him;(t) and accordingly, the mere passing of the money in account will not, in general, be sufficient to free the factor or broker from his liability.(u) Lastly; where the accounts between the factor or broker and his principal are closed and a balance struck, an action for money had and received or on an account stated, will lie to recover such balance;(x) and it is presumed that, even where there is a covenant to account, yet, if on a balance being stated and settled between the parties, it is found to be in favour of the principal, the law will imply a promise on the part of the factor or broker to pay such balance, and that the principal can sue therefor in *indebitatus assumpsit*.(y)

Where the factor or broker has a commission *del credere*, it is usual to sue him specially on the undertaking which he gives in such cases, to be responsible to his principal for the solvency of the persons with whom he deals.(z)

[ \*270 ] \*2. Where the breach of duty complained of has reference more particularly to some negligence of which the factor or broker has been guilty in the course of his agency,—whether such negligence has consisted in nonfeasance or misfeasance,

(n) *Scott v. Surman*, Willes, 400.

(o) *Buchanan v. Findlay*, 9 B. & C. 738, (17 E. C. L. R.); *Poulter v. Cornwall*, Salk. 9.

(p) See *Taylor v. Lendie*, 9 East, 49.

(q) See *Edgar v. Fowler*, 3 East, 222, 223.

(r) *Scott v. Surman*, *supra*.

(s) *Hartup v. Wardlove*, 2 Show. 308.

(t) *Brind v. Hampshire*, 1 M. & W. 365. (\*) *Baron v. Husband*, 4 B. & Ad. 612, (34 E. C. L. R.); *Williams v. Everett*, 14 East, 582, 596; *Scott v. Percher*, 3 Meriv. 652.

(u) See *Buller v. Harrison*, Cowp. 565; *Horsefall v. Handley*, 8 Taunt. 136, (4 E. C. L. R.).

(x) *Eagles v. Vale*, Cro. Jac. 69.

(y) See *Wray v. Milestone*, 5 M. & W. 21; (\*) *Rackstraw v. Imber*, Holt, N. P. C. 368, (3 E. C. L. R.).

(z) 1 J. B. Moore, 279, (4 E. C. L. R.); 2 Chitty on Pl. 217, note (y.)

—or to some unauthorised disposal by him of the property committed to his care, in such cases the principal's remedy may be, either by action of special *assumpsit* on the express or implied promise of the factor or broker to do his duty in the matter in question, or by an action on the case founded in tort, for a breach of the obligation to perform that duty which the law imposes upon him from the very nature of his employment.(a) But where it appears that the neglect or breach of duty imputed to the agent amounts, not to a mere infringement of his contract, but actually to a tort, there it would seem that an action on the case is the proper remedy;(b) and it appears further, that where the declaration in an action by principal against agent contains a count in trover, and likewise a count charging the agent with a breach of duty for not accounting, the court will, on general demurrer to the whole declaration, construe the latter count to be laid in tort, and not in *assumpsit*, so as to do away with an objection on the ground of mis-joinder.(c)

Again, if the factor or broker dispose of property intrusted to him, in such a manner as that his conduct amounts to a conversion thereof, he will be liable to his principal in an action of trover.(d) Thus, if a factor tortiously pledge the property of his principal, the latter may sue him in trover for the recovery thereof;(e) so, if the principal deliver \*goods to his factor with instructions to [ \*271 ] sell them, but before the goods are sold he countermands these instructions, notwithstanding which however the factor sells the goods, this will be a conversion in him, and will render him liable to his principal in trover;(f) in like manner, if an insurance broker wrongfully withhold from his principal a policy of insurance effected by him on account of the latter, an action of trover will lie against him to recover the possession thereof;(g) and it would seem that, in general, this action will lie against a factor or broker, if he misuse property intrusted to him by dealing with it in any way not warranted by his commission.(h)

In order, however, to render the factor or broker liable in this form of action it must appear, either that there has been an actual tortious conversion of the goods on his part,(i) or that there has been a demand for the goods by the principal from him, and a refusal by him to deliver them, when such delivery was in his power;(k) and therefore, if he have been guilty of mere negligence or non-feasance, trover will not lie against him.(l) Thus, trover will not lie against a factor for

(a) See per Bayley and Littledale, Js., *Burnett v. Lynch*, 5 B. & C. 589. 604. 609, (12 E. C. L. R.); 1 Chitty on Pl. 102. 134. (b) See *Smith v. White*, 8 Scott, 483.

(c) *Judin v. Samuel*, 1 Bos. & Pul. N. R. 43; S. C. in Error, 6 East, 333.

(d) Per Holt, C. J., Anon. 12 Mod. 602, case 997.

(e) See *Scott v. Newington*, 1 M. & Rob. 252; *Jones v. Cliff*, 1 C. & M. 540.(\*)

(f) See dictum of *Berkley, J.*, Com. Dig. Action upon the case upon trover, E.

(g) *Harding v. Carter*; coram Lord Mansfield, Easter Vacation, 1781. Cited 1 Park on Mar. Insur. 5.

(h) Anon. 2 Salk. 655; *Syeds v. Hay*, 4 T. R. 264; *Yowle v. Harbottle*, Peaks, N. P. C. 49.

(i) *Fuller v. Smith*, 3 Salk. 366; per Buller, J., *Weymouth v. Boyer*, 1 Vea. jun., 416. 424, and per Heath, J., *Bromley v. Coxwell*, 2 Bos. & Pul. 438, 439.

(k) Buller, N. P. 44; *Smith v. Young*, 1 Camp, 439.

(l) See per Heath, J., *Bromley v. Coxwell*, *supra*; and per Lord Ellenborough, *Severin v. Keppell*, 4 Esp. 156, 157.

the mere negligent custody of goods, by means whereof they have been spoiled, (m) or lost, or stolen; (n) nor is he liable to this action [ \*272 ] where the only breach of duty \*complained of is, that he has sold goods at a price less than that at which he was authorized to sell them; (o) or that, having been intrusted with goods under an agreement to sell them himself, he has delivered them to a sub-agent for that purpose. (p) In like manner, if a factor sell goods in pursuance of his authority, but afterwards refuse to deliver over the proceeds to his principal, this will not render him liable to an action of trover for such goods; (q) and so, if a bill-broker be authorized by the holder of a bill of exchange to get such bill discounted, and to apply the proceeds in a particular way, and the broker does get the bill discounted but misapplies the proceeds or part thereof, an action of trover will not lie against him to recover possession of the bill. (r) In these and like cases the courts appear to proceed on the principle, that the factor or broker, having parted with the property in pursuance of his authority, has been guilty of no conversion of the property itself; and that therefore,—whatever remedy the principal may have, to recover from him the proceeds of such property,—he cannot proceed by an action of trover *in rem*, because the gist of that action is the conversion.

But although where a factor or broker disposes of property according to his authority, the fact of his misapplying or refusing to account for the proceeds thereof will not intitle the principal to sue him in trover for the purpose of recovering that property, still there can be no doubt, that if he invests the proceeds of the property sold in some other description of property, such as goods, or securities, or stock, the principal will be intitled to sue either the factor or broker himself, or, in the event of his bankruptcy, his assignees, in trover for such [ \*273 ] property, provided it can be traced to be \*actually the product of the money which the factor or broker has so misapplied; and the reason of this is, that the property of a principal intrusted by him to his factor or broker for any special purpose is still taken to belong to the principal,—notwithstanding any change which it may have undergone in point of form,—so long as such property is capable of being identified and distinguished from all other property. “The product or substitute of the original thing,” says Lord Ellenborough, “still follows the nature of the thing itself, so long as it can be ascertained to be such; and the right only ceases where the means of ascertainment fail, which is the case when the subject is turned into money, and mixed and confounded in a general mass of the same description.” (s)

3. Next, as to the nature of the damage which the principal must have sustained, in order to his being able to fix the liability of the factor or broker.

(m) Cro. El. 219; Owen, 141; Com. Dig. Action upon the case upon trover, E.

(n) Salk. 655, note (a); *Ross v. Johnson*, 5 Burr. 2825.

(o) *Dufresne v. Hutchinson*, 3 Taunt. 117.

(p) *Bromley v. Corwell*, 2 Bos. & Bul. 438.

(q) *Per Buller, J., Weymouth v. Boyer*, 1 Ves. jun. 416. 424.

(r) *Palmer v. Jarman*, 2 M. & W. 282. (\*)

(s) *Taylor v. Plumer*, 3 M. & Sel. 562. 574, 575; *Scott v. Surman*, Willes, 400; *Whitecomb v. Jacob*, Salk. 160; and *per Burnet, J., Ryall v. Rolle*, 1 Atk. 165. 172.

Where the principal sues his factor or broker in trover, he will be intitled to recover damages against him, provided he prove that the latter actually converted the property, because the conversion is, as we have seen, the gist of that action;(t) and so, where he sues him in case or *assumpsit* for negligence or breach of duty, he will be intitled to recover provided he show, that by reason of the agent's misconduct he has forfeited some right which, but for such misconduct, the law would have enabled him to enforce.(u) But it is not necessary that the principal, in order to maintain these actions, should prove that he has sustained any actual \*damage by the deprivation of his right; for the mere injury to the right itself [ \*274 ] constitutes a good cause of action, and the party whose right has been injured is always intitled, at least, to nominal damages;(x) nor does it make any difference in such cases, whether the form of action adopted by the principal be founded in contract or in tort, or whether the duty, the breach of which is complained of, has resulted from an express contract, or from one which is merely implied.(y) Still, however, the principal must be prepared to prove that he has been actually deprived of a right by reason of the agent's breach of duty; and therefore, if it appear that the alleged right was such that no cause of action could ever have been founded thereon,(z) or that, although it would have formed a good cause of action, is must still have been defeated on some other ground independent of the misconduct of the agent,(a)—in neither case will the principal be intitled to recover.

On the other hand, although the principal must thus be in a situation to show that he has been deprived of some right by the misconduct of his factor or broker, in order to his being intitled to sue him for such misconduct, still it should be observed, that it is not necessary that the misconduct complained of should have been the immediate cause of the principal's loss, but that, if it was the proximate cause of that loss, this will be sufficient to entitle him to maintain his action. Thus, although under ordinary circumstances, a factor to whom goods had been intrusted would not be liable for a loss which had happened to them by fire or robbery,(b) still, if it were shown that before the happening of the loss he had negligently deposited the goods in an unsafe and improper place, and that whilst [ \*275 ] there they had been lost by \*either of these causes, his negligence would be regarded as the proximate, although not the immediate cause of that loss, and he would be held liable accordingly;(c) and in like manner, although the immediate cause of the loss on a policy of insurance is always the happening of a particular peril, still, if that peril be one which it was the duty of the broker to have insured against, his neglect in this respect will be considered to have been the proximate cause of the loss, and will render him liable to his principal for the damage thereby sustained. In all these cases the courts

(t) 1 Chitty on Pl. 161.

(u) *Marzetti v. Williams*, 1 B. & Ad. 415, (20 E. C. L. R.); *Webster v. De Tastet*, 7 T. R. 157; *Fomin v. Oswell*, 3 Camp. 357; and see per De Grey, C. J., *Wells v. Watling*, 3 W. Bl. 1233. (x) *Marzetti v. Williams*, *supra*. (y) *Ibid*.

(z) *Webster v. De Tastet*, *supra*.

(b) *Ante*, p. 38, and cases there cited,

(c) *Fomin v. Oswell*, *supra*.

(d) *Goswill v. Dunkley*, Str. 680.

are guided by the principle, that whatever may have been the immediate cause of the loss complained of, the property would not have been in a situation to sustain that loss but for the agent's previous neglect of duty; (d) and that although the property might have been equally exposed to the immediate cause of the loss even if the agent had done his duty, still he shall not be permitted to urge this circumstance as an excuse for his neglect, because no man can be allowed to qualify his own wrong. (e)

Lastly; let us review the defences of which the factor or broker may avail himself, in answer to the various actions which the principal may bring against him for the purpose of enforcing his liabilities.

Where the principal sues the factor or broker for a money demand, he may of course assert in answer to such action, any claim of set off which he may have against the principal on the score of commission payable to him in respect of his work and labour as an agent, or for advances made or expenses incurred by him in the course of his agency. (f) We have already seen under what circumstances the factor or broker will be allowed to make charges of this description, [ \*276 ] and it need only be added, as a general rule, that wherever they are allowable they will form a good answer, either in whole or in part, to any action brought by the principal against him, the gist of which is a money demand; because, as has been well said, the plaintiff in such cases can recover no more than he is in conscience and equity intitled to, and that can be no more than what remains after deducting all just allowances which the factor or broker is intitled to retain out of the very sum demanded. (g) In like manner, if the principal sues the factor or broker in trover in order to recover the possession of property which he alleges that the latter wrongfully withholds from him, he will, agreeably to the above rule, be, in general, only allowed to recover such property subject to all just claims of lien which the factor or broker may have thereon; and these claims will, according to circumstances, afford either a partial or an entire defence to such action. (h) But there is one case in which these rules will not hold, that namely in which the principal sues his factor or broker to recover goods or money which he has deposited with, or remitted to him, with instructions to apply the same to a particular purpose, but which the latter refuses to apply according to those instructions; because the duty of the factor or broker in such a case is, either to appropriate the goods or money to the purpose for which they were intended, or, if he refuse so to appropriate them, to return them to his principal; and consequently, if an action be brought to recover such goods or money from him, he will not be allowed to retain them on the ground that he has a lien on the goods, or a set off against his principal to an equal amount. If however, after having fulfilled his instructions with reference to the goods or money, there be still a part of the one, or a balance of the other remaining in his hands, then as to that part or balance the ordinary

(d) See *Caffrey v. Darby*, 6 Ves. jun. 489. 496.

(e) See per Tindal, C. J., *Davis v. Garrett*, 6 Bing. 716. 724, (19 E. C. L. R.)

(f) *Dale v. Sollett*, 4 Burr. 2133.

(g) Per Lord Mansfield, *Dale v. Sollett*, *supra*.

(h) *Ante* p. 240.

rule will apply; and accordingly, if he have \*any claim [ \*277 ] of lien or set off against his principal, he will be allowed (i) to retain such part or balance in satisfaction thereof. Again; if the principal sues his factor for not accounting for and paying over the proceeds of goods sold by him on his account, it will be a good defence by the factor to show, that he sold the goods on credit pursuant to his authority, and that, without any default on his part he had not yet received the price; (j) so it appears, that where a factor sells goods for his principal and, at the time of the sale, discloses to him the name of the purchaser, the principal can maintain no action against the factor for the price of the goods, unless he can show that he has actually received such price, or that in the transaction in question, he acted under a commission *del credere*. (k) So, where the factor or broker acts under a commission *del credere* he may, in addition to the other defences of which he is intitled to avail himself, show that his liability has been discharged, by the principal having done some act which amounts to a waiver of his guarantee; (l) and in like manner, if the factor agree with his principal; in consideration of an increased rate of commission, to purchase goods for him, and likewise to indemnify him from a particular contingency,—for instance from any loss by a re-sale,—it will be a good defence to an action on that agreement to show, that after the purchase, the principal had an opportunity of selling the goods at a profit, and that with full means of knowing that fact, he had allowed such opportunity to pass without taking advantage of it; (m) nor would it appear to be necessary for the factor, in such a case, to give notice to his principal of the state of the market, unless the agreement contained a stipulation to that effect, or it were made to appear that this was a fact peculiarly within the factor's own knowledge. (n)

\*But if money be paid by a third person to a factor or [ \*278 ] broker as the agent of his principal, it will be no defence to an action brought against him by the principal to recover that money, that it was the proceeds of a contract which, as between the principal and the person who had paid it, was illegal; (o) because that action is founded on a ground totally distinct from the illegal contract, and, consequently, cannot be affected by it. On the contrary, however, if the principal cannot establish his claim against the factor or broker without giving evidence of the illegal contract, he will not be allowed to recover any money which has been paid to him thereon. (p) And in like manner, if it appear from the evidence given on behalf of the agent, that the contract on which the money was paid was illegal, and that he himself was a party to it, the principal will not be intitled to recover, because, *in pari delicto potior est conditio defendentis*. (q)

(i) Buchanan v. Findlay, 9 B. & C. 738, 749, (17 E. C. L. R.)

(j) Per Buller, J., Varden v. Parker, 2 Esp. 710.

(k) Per Hullock, B., Alap v. Silvester, 1 C. & P. 107, (11 E. C. L. R.)

(l) See ante, p. 247.

(m) Curry v. Edensor, 3 T. R. 524.

(n) Per Lord Kenyon, and Buller, J., *ibid.* 527, 529.

(o) Tenant v. Elliott, 1 Bos. & Pul. 3; Farmer v. Russell, *ibid.* 296.

(p) Booth v. Hodgson, 6 T. R. 405; Ex parte Bulmer, 13 Ves. jan. 313; Sullivan v. Greaves, 2 Stark. on Evid. 96, 3d edition; McGregor v. Lowe, Ry. & Mood. 57, (21 E. C. L. R.)

(q) Farmer v. Russell, *supra*. Although the propositions contained in the text are, it is

[ \*279 ] Further, it is a settled rule of law that an agent shall not \*be allowed to dispute the title of his principal, and that, after receiving money in that capacity, he is not at liberty to say that he did not receive it for the benefit of his principal, but for that of some other person.(r) If therefore a factor or broker sells goods for his principal and receives the money for them, he cannot controvert his principal's title to the goods, in an action brought against him by the latter to recover that money ;(s) and in like manner, if a broker receives from the underwriters the amount of a loss which has occurred on a policy effected by him as the agent of his principal, he cannot dispute the claim of the latter to the amount so received, on the ground that others, as well as he, were interested in the subject-matter of the insurance.(t)

But still it would appear that the above rule is not of universal application; and accordingly, where an action was brought by a principal against his agent, to recover the proceeds of certain goods which the latter had been instructed to sell on his account, the agent was permitted to prove, as a defence to that action, that the goods in question had come to the possession of the principal by means of collusion with a third person who had no title to them, and that, before he had paid over the proceeds thereof to his principal, the person really intitled to the goods had given him notice of his claim; and, these facts having been found by the jury, the agent was held to be intitled to their verdict.(u) If however, in such a case as the above, the person really intitled to the goods,—although fully aware of the circumstances under which the principal became possessed of them,—yet abandons his claim, the agent will \*not be allowed to give [ \*280 ] those circumstances in evidence as a defence to an action brought against him by his principal, to recover such goods or their proceeds.(x)

Where the action brought by the principal against his factor or broker is grounded in some alleged negligence or breach of duty on the part of the latter, he may avail himself, according to circumstances, of some one or more of the following defences. For instance, he may show that in the case in question the instructions given to him by his principal were general in their terms, and that the breach of duty complained of arose from his having, under these circumstances, fol-

believed, perfectly settled law, still they cannot but be regarded as somewhat paradoxical,—inasmuch as it is not easy to discover on what principle it is, that a man should be allowed to recover the proceeds of a contract proved to be illegal, when those proceeds are in the hands of an innocent third party, and yet not be allowed to recover them from one with whom he is *in pari delicto*, provided only, in the former of these cases proof of the illegality comes from the third person instead of from the plaintiff himself. Surely it would have been as well, in all such cases, to have adhered to Lord Mansfield's maxim ;—"that if from the plaintiff's own showing or otherwise the cause of action appears to arise *ex turpi causa*, or from the transgression of a positive law of this country, there the court says he has no right to be assisted." *Holman v. Johnson*, Cowp. 343. See also the observations of *Rooke, J.*, *Farmer v. Russell*, *supra*.

(r) *Per Abbott, C. J.*, *Dixon v. Hamond*, 2 B. & AL. 310. 313. And see *Nicholson v. Knowles*, 5 Madd. 47; *Cresskey v. Mills*, 1 C. M. & R. 298;(\*) *White v. Bartlett*, 9 Bing. 378, (23 E. C. L. R.)

(s) See *Jones v. Dwyer*, 17 East, 21.

(t) *Roberts v. Ogilby*, 9 Price, 269, (4 E. Ex. R.)

(u) *Hardman v. Willcock*, 9 Bing. 382, (23 E. C. L. R.) note (a), decided by *Alderson and Patteson, J.* in the Court of Common Pleas at Lancaster.

(x) *Bettaley v. Reed*, 12 Law Journ. Q. B. 172.

lowed *bonâ fide* the usage of trade;(y) or if there were no usage of trade applicable to the particular case, then he may show that, in executing his commission, he acted *bonâ fide* to the best of his judgment.(z) Again; he may show that his instructions were ambiguous, and that in acting thereon he exercised a reasonable and proper degree of care and skill;(a) or he may show that, after having done all that was usually done in like cases, he found it impossible to fulfil his instructions at all, and that he gave his principal due notice of that fact;(b) or that, by the occurrence of circumstances of emergency, he was prevented from obeying the strict letter of his instructions, and that accordingly, he adopted such a course as appeared to him at the time to be best calculated to further the interests of all parties;(c) and, in general, the factor or broker will be excused, provided he show that he acted in the particular case, in the same manner as other persons \*of experience and skill exercising the same profession would have acted, had they been placed in [ \*281 ] similar circumstances.(d)

In like manner, it will be a good defence on the part of the factor or broker to an action brought against him for an alleged breach of duty, to show, that had he acted according to his instructions he must have been guilty of a breach of the laws of this country,(e) or have committed a fraud on third parties;(f) and so, if it be made to appear that a violation of the law has already taken place in furtherance of the particular transaction, and that such violation of the law formed part of the original agreement between the factor or broker and his principal, this fact will be a good ground of defence to any action brought by the latter against the former, for a breach of duty subsequently committed by him in the course of that transaction.(g)

Again; it appears that if a merchant direct his factor or correspondent to insure, and he charges him with it as if done, and a loss happens, he shall be charged as insurer;(h) and accordingly it is held, that where in such cases the principal sues his factor or broker for neglecting to make insurance, the latter may avail himself, as a defence to that action, of any circumstance which would have been a good defence by him had he been actually the insurer. This, it will at once be seen, follows from the application to this particular case, of the general rule stated above, namely, that the principal in order to be intitled to recover against his factor or broker for negligence in the course of his agency, must show that he has been deprived \*of some right by that negligence;(i)—inasmuch as [ \*282 ] it is evident that, if when the factor or broker is sued for neglecting to insure, he were not allowed to avail himself of the same defences as if he were the insurer, the principal might be in a position to recover

(y) 3 Chitty on Com. & Man. 217; ante 31.

(z) Moore v. Mourgue, Cowp. 479; Comber v. Anderson, 1 Camp. 523.

(a) Chapman v. Walton, 10 Bing. 57, (25 E. C. L. R.)

(b) Smith v. Cologan, 2 T. R. 188, note (a); Callander v. Oelrichs, 6 Scott, 761.

(c) 3 Chitty on Com. & Man. 218; Story's Com. on Agency, § 193; ante, 22. 24.

(d) See Chapman v. Walton, supra.

(e) Holman v. Johnson, Cowp. 341; Ex parte Mather, 3 Ves. jun. 373.

(f) Bexwell v. Christie, Cowp. 395.

(g) Catlin v. Bell, 4 Camp. 183.

(h) Tickle v. Short, 2 Ves. 239; Com. Dig. Merchant, B.

(i) Ante, 273.



damages in that action, when, had he sued the insurer on the policy, he could have recovered nothing, and when, consequently, he had been deprived of no right by the misconduct of his factor or broker. If therefore the voyage was illegal,<sup>(k)</sup> or if a deviation has taken place in the course thereof,<sup>(l)</sup> the agent will not be liable for having neglected to insure. And in like manner it has been said, that if the neglect complained of be, that by reason of the non-communication by the broker to the underwriter of a material fact, the policy was avoided, it will be a good defence to an action brought against the former for such neglect, to show that had that fact been communicated, it would have rendered it impossible to effect the insurance at the premium to which he was limited by his instructions.<sup>(m)</sup>

And lastly; it will be a good defence to an action brought against the factor or broker for a breach of duty, to show that his principal has ratified the act complained of;<sup>(n)</sup> because, in such cases, a subsequent sanction is considered to be the same thing, in effect, as assent at the time.<sup>(o)</sup> To the circumstances which will amount to evidence of such ratification we have already had occasion to advert,<sup>(p)</sup> and it is therefore unnecessary to repeat them in this place.

[ \*283 ] \*In addition to the civil proceedings to which the factor or broker will thus be liable if he commit a breach of duty in the course of his agency, there are also certain cases in which the principal may resort to criminal proceedings in order to punish him for any such breach of duty. Thus, by statute 5 & 6 Vict. c. 39, s. 6, it is enacted:—that if any agent who shall be intrusted with the possession of goods or of the documents of title to goods shall, contrary to or without the authority of his principal in that behalf, for his own benefit and in violation of good faith make any consignment, deposit, transfer, or delivery of any such goods or documents of title, by way of pledge, lien, or security; or shall accept any advance on the faith of any agreement to consign, deposit, transfer, or deliver such goods or documents of title, such agent shall be deemed guilty of a misdemeanor.<sup>(q)</sup> In like manner, it is enacted by statute 7 & 8 Geo. 4, c. 29, s. 49:—that if any money or security for the payment of money shall be intrusted to any broker or other agent, with any direction in writing, to apply such money or the proceeds of such security to any purpose specified in such direction, and he shall, in violation of good faith and contrary to the purpose so specified, in anywise convert to his own use such money, security or proceeds, or any part thereof; or if any chattel or valuable security, or any power of attorney for the sale or transfer of any share or interest in any public stock or fund whether of this kingdom or of any foreign state, or in any fund of any body corporate, company or society shall be

(k) *Webster v. De Tastet*, 7 T. R. 157.

(l) *Delany v. Stoddart*, 1 T. R. 22.

(m) *Anon. coram Chambre, J.*, York Sum. Assizes, 1808, reported Paley on Agency, by Lloyd, 20.

(n) *Wolff v. Horncastle*, 1 Bos. & Pul. 316. 323; *Maclean v. Dunn*, 4 Bing. 722. 727, (15 E. C. L. R.); per Buller, J., *Smith v. Cologan*, 2 T. R. 189.

(o) Per Bost, C. J., *Maclean v. Dunn*, *supra*.

(p) *Ante*, 26; and see *Wilson v. Poulter*, 2 Stra. 859; *Cornwall v. Wilson*, 1 Ves. 509; *Clarke v. Perry*, 2 Freem. 48; *Prince v. Clarke*, 1 B. & C. 186, (8 E. C. L. R.)

(q) See also 6 Geo. 4, c. 94, s. 7; and 7 & 8 Geo. 4, c. 29, s. 51, Appendix, post.

intrusted to any broker or other agent for safe custody or for any special purpose, without any authority to sell, negotiate, pledge or transfer the same, and he shall, in violation of good faith, sell, negotiate, transfer, pledge or in any manner convert to his own use such chattel or security, or the share or interest in the stock or fund to which such warrant of attorney \*shall relate, he shall in [ \*284 ] each case be guilty of a misdemeanor; and it is by the said statutes further enacted, that the factor or broker, on being convicted of the offence in either of the above cases, shall be liable to transportation for any term not exceeding fourteen years nor less than seven years, or to suffer such other punishment by fine or imprisonment, or both, as the court shall award.(r)

It is, however, further provided by these statutes;—that no factor or broker shall be liable to be convicted thereunder for any act done by him, provided he shall, at any time previous to his being indicted for the offence, have disclosed such act on oath, in consequence of any compulsory process of any court of law or equity, in any action, suit, or proceeding which shall have been *bonâ fide* instituted by any party aggrieved, or if he shall have disclosed the same in any examination or deposition before any commissioner of bankrupt(s) and lastly it is provided;—that no agent shall be liable to any prosecution, for consigning, depositing, transferring, or delivering any goods or documents of title with the possession of which he may have been intrusted, in case the same shall not be made a security for or subject to the payment of any greater sum of money than the amount which, at the time of such consignment, deposit, transfer, or delivery, was justly due to such agent from his principal, together with the amount of any bills of exchange drawn by or on account of such principal and accepted by such agent.(t)

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## \*CHAPTER III.—SECTION II. [ \*285 ]

### ON THE LIABILITIES OF FACTORS AND BROKERS.

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#### PART II.

##### ON THEIR LIABILITY TO THIRD PERSONS.

IN addition to the rights which may be acquired by factors and brokers in the course of their employment, and the liabilities which they may thereby incur to their principals, such employment may be attended with a still further consequence, namely, the incurring by them of certain liabilities to third parties. These liabilities, again, may arise from either of the following causes, namely, *first*, from the contracts into which they enter with third parties, or *secondly*, from the torts which they commit against third parties, in the course of

(r) 5 & 6 Vict. c. 39, s. 6; 7 & 8 Geo. 4, c. 29, s. 51.

(s) 5 & 6 Vict. c. 39, s. 6; 7 & 8 Geo. 4, c. 29, s. 52.

(t) 5 & 6 Vict. c. 39, s. 6; 7 & 8 Geo. 4, c. 29, s. 51.

their agency ; and accordingly we propose to consider these liabilities in the above order, such arrangement, indeed, being apparently suggested by the very nature of the subject of which we are about to treat.

1. Let us then, in the first place, inquire what are the liabilities which factors and brokers may incur to third parties, on contracts entered into with them in the course of their employment.

No rule of law, it is said, is better ascertained or stands upon a stronger foundation than this,—that where an agent enters into a contract for his principal and names his principal, the principal is responsible and not the agent ;(a) \*and hence it follows, that if [ \*286 ] a factor or broker enters into a contract of sale or purchase, or indeed into any other contract, merely in his capacity of agent, and at the same time names his principal, the latter will be considered in point of law to be the real contracting party : and if the contract entered into be within the scope of the agent's general authority, the principal alone will be liable thereon.(b)

Such is the general rule of law with reference to the liability of agents on contracts entered into by them in the course of their employment,—a rule which, it is said, is certainly founded in convenience and sound policy, and which has accordingly been generally adopted by the modern commercial nations of Europe.(c) But although by the prevalence of the above rule many embarrassments are avoided which would inevitably result from a contrary state of the law on this subject, it is evident that were the rule itself relaxed in its terms, such relaxation would be attended with very hurtful consequences. Thus, although it would be productive of much inconvenience in the course of commercial transactions, if an agent could not, by adopting any precaution, avoid a personal responsibility ; it would still be attended with equal inconvenience, if the agent were at liberty so to deal with others as not only to avoid such responsibility, but at the same time to leave those with whom he dealt, in doubt as to who was the party [ \*287 ] really chargeable ; \*and accordingly it is clear, that if the agent acts in such a manner as to cause a doubt on this point, third parties will be at liberty to regard him as the person really responsible, and to proceed against him accordingly. If therefore a factor or broker enters into a contract for the purchase of goods, but at the time of entering into such contract he does not name his principal, the person selling to him will be presumed to have looked to his credit only, and he will consequently be liable for the price of the goods ;(d) and so, if the factor or broker enters into a contract for the

(a) Per Lord Erskine, *Exparte Hartop*, 12 Ves. jun. 349. 359.

(b) See per Parke, B., *Thomas v. Edwards*, 2 M. & W. 215. 217, (\*) per Lord Kenyon, *Owen v. Gooch*, 2 Esp. 567. 569 ; *Johnson v. Ogilby*, 3 P. Wms. 277. 279 ; 3 Chitty on Com. & Man. 211 ; 1 Chitty on Pleading, 34 ; Story, Com. on Agency, § 261 ; 2 Kent. Com. on Amer. Law, 630. Domat lays down the rule thus ; "Factors and agents who treat only in this quality are not personally bound by the engagements which they contract on account of the business which is intrusted to them, and in the name of their masters." 1 Domat, B. 1, tit. 16, § 3, pl. 8 ; and so it is said by Emerigon, that "the agent who promises, bargains, or acts merely in that capacity, is in no case personally liable," 2 Emerigon. Assur. 465.

(c) Story, Com. on Agency, § 262.

(d) *Seaber v. Hawkes*, 5 M. & P. 549 ; *Exparte Hartop*, *supra* ; *Owen v. Gooch*, *supra* ;

sale of goods, and an action is brought against him by the buyer for the non-delivery thereof pursuant to such contract, it will be no defence to that action, that the defendant was merely an agent, and that this was known to the plaintiff before action brought; but, in order to constitute such a defence, the agent must show, either that the principal was notified at the time the contract was entered into, or that the plaintiff has done some act subsequently, which evinces an intention on his part to waive the liability of the agent and to rely on that of the principal only.(e) In like manner, if the factor orders goods for his principal and names his principal, but the seller refuses to deliver them except on the credit of the factor or broker only, and the goods are so delivered, the factor or broker will be liable.(f) Again; if a factor or broker enters into a contract for the sale or purchase of goods, and the person with whom he deals knows that he is only an agent, but does not know who his principal is, he will be at liberty to look to him as the real contracting party, and to charge him accordingly.(g) Nor \*does it appear to be necessary in such a [ \*288 ] case as this, that the person who thus deals with a known agent should make any inquiry as to who is the principal in the transaction,—it being the duty of the agent, if he wishes to avoid responsibility, to state who that principal really is;(h) and, *a fortiori*, if after the goods are delivered, the seller makes inquiry of the agent as to who is the actual purchaser, but the latter refuses to disclose his name, he himself will be liable.(i) But if the seller once debits the principal, he cannot afterwards charge the agent; and in like manner, if he delivers an invoice and bill and parcels in which he debits A. as the purchaser, for goods bought through B. as his agent, he will be taken to have thereby made his election to charge the principal, and will not be intitled afterwards to resort to the agent.(k)

Thus it appears, that in cases like the above the factor or broker, although liable, is not exclusively so; and indeed it may be stated as a well settled rule, that where a factor or broker acts for an undisclosed principal, the person with whom he deals,—although in the first instance he has debited him,—may still, on discovering the principal, have recourse to the latter instead of to the factor or broker,—subject to one qualification only, to wit, that the state of accounts between them has not, meanwhile, been altered to the prejudice of the principal.(l) There are, however, cases in which this rule does not hold, but in which, on the contrary, the factor or broker is always held to be exclusively liable, unless there be proof that the credit was in the first instance actually given to the principal. Thus it is said, that when a factor in this country buys for a merchant abroad, then, according to the universal understanding of merchants and [ \*289 ] \*of all persons in trade, the credit is considered to be given

Thomas v. Edwards, *supra*; Paterson v. Gandesiqui, 15 East, 62; Addison v. Gandesiqui, 4 Taunt. 574; per Lord Mansfield, Rabone v. Williams, 7 T. R. 360, note (e).

(e) Per Lord Ellenborough, Morgan v. Corder, cited Paley an Agency, by Lloyd, 372.

(f) Owen v. Gooch, 2 Esp. 567, 568.

(g) Thompson v. Davenport, 9 B. & C. 78, (17 E. C. L. R.)

(A) Ibid.

(i) Owen v. Gooch, *supra*.

(k) Per Littledale, J., Thompson v. Davenport, 9 B. & C. 78. 90, (17 E. C. L. R.)

(l) Per Lord Tenterden, C. J., *ibid*. 86.

to the British buyer, and not to the foreigner; (m) so it appears that, according to the course and practice of the Stock Exchange, the general usage is to give credit to the broker, even although the name of the principal be disclosed; (n) and in like manner, according to the ordinary course of trade in insurance cases, the insurance broker is held to be exclusively liable to the underwriter for all the premiums payable on policies which he effects for him. (o) In these instances therefore the usage of trade will always fix the liability of the factor or broker, unless there be evidence to rebut the presumption arising from such usage, namely, that it was to him that the credit was exclusively given; and accordingly, in the absence of such evidence, he will be regarded as the only person who is liable on the contract.

Again; it is clear that if a factor or broker enters into a contract in writing in such a form as to make himself personally responsible, he cannot afterwards relieve himself from that responsibility by showing that he contracted merely as an agent; and it will make no difference whether his principal were or were not known at the time of the contract. (p) Thus if a factor or broker sells goods, and gives an invoice to the purchaser describing them as being bought of himself, he will be liable to the purchaser in an action brought against him for the non-delivery thereof; and it will be no defence on the part of the factor or [ \*290 ] broker to that action, to show that at the time the goods were \*sold he intimated to the purchaser that he sold as an agent only, and further, that the invoice was made out in his name merely in conformity with the custom of trade at the particular place, —the object of such custom being, to insure the passing of the purchase-money through the hands of the factor or broker. (q) In like manner, if a broker enters into a contract for the sale of stock or shares, and delivers a contract-note which mentions his own name as that of the seller, he will be liable to an action at the suit of the purchaser for not completing the sale; and he will not be permitted to give in evidence as a defence to that action, that, according to the custom of the particular place where the contract was made, it was usual to deliver broker's notes without disclosing the name of the principal. (r) And so, if a factor or broker enters into a written agreement for the sale of goods, it is not competent for him, in an action brought against him for the non-delivery thereof, to show that such agreement was really made by him by the authority of and as agent for a third person, and that the plaintiff was aware of those facts at the time the agreement was made and signed. (s) In cases such as these the courts proceed upon the same principle, that parol evidence is not admissible for the purpose of contradicting a written agreement; and accordingly the agent will always be bound, wherever the form of the instrument is

(m) Ibid. and see per Bayley, J., *Paterson v. Gangesqui*, 15 East, 62. 69; and per Eyre, C. J., *De Gaillon v. L'Aigle*, 1 Bos. & Pul. 368.

(n) See *Mortimer v. McCallan*, 6 M. & W. 58. 61. (\*)

(o) Per Bayley, J., *Power v. Butcher*, 10 B. & C. 329. 340, (21 E. C. L. R.); per Lord Tenterden, *Scott v. Irving*, 1 B. & Ad. 605. 612, (20 E. C. L. R.); and see the learned reporter's note to the case of *Dalzell v. Mair*, 1 Camp. 534.

(p) Per Denman, C. J., *Jones v. Littledale*, 6 Ad. & E. 486. 490, (33 E. C. L. R.)

(q) *Jones v. Littledale*, 6 Ad. & E. 486, (33 E. C. L. R.)

(r) *Magee v. Atkinson*, 2 M. & W. 440. (\*)

(s) *Higgins v. Senior*, 8 M. & W. 834. (\*)

such, that from a reasonable exposition of the whole he appears to be personally liable thereon,<sup>(t)</sup> and that without reference to the question, whether, at the time of his entering into the contract, the other contracting party was aware that he contracted as principal, or merely as an agent.

For a like reason, a factor or broker who draws, accepts or indorses bills-of-exchange in his own name and without \*qualification, will always be held liable to third parties thereon;<sup>(u)</sup> [ \*291 ] and even where a bill drawn by the principal on his factor is expressed to be payable out of certain moneys of the former which the latter has in his hands, the factor, if he accept such bill generally, will be liable to third parties thereon, although as between him and his principal the balance of accounts may actually be in his favour.<sup>(x)</sup> In like manner, if a factor purchase goods and remit bills-of-exchange for the price, to which he does not attach his name, but which he promises to see paid by the parties thereto, this will render him liable for the price of the goods;<sup>(y)</sup> but if he draws a bill on a third party, and remits it to him for acceptance on account of his principal and subject to the ratification of the latter, the acceptance of such third party becomes, so soon as the ratification is given, an absolute acceptance on account of the principal, and the acceptor, if he afterwards pay the bill, cannot recover from the factor the money so paid, as money paid to his use.<sup>(z)</sup>

In like manner, if a factor enters into a charter-party in his own name with the master of a ship, for the hire of the ship at a certain rate *per* month, the factor himself, and not the goods of his principal which are loaded on board such ship, will be liable for the freight.<sup>(a)</sup> So, it appears that if, after a charter-party has been entered into by the principal himself for a particular voyage, and after the voyage has been partially performed, the factor enters into an agreement in his own name with the master, under which the ship is sent on a different voyage from that which was originally agreed upon, the [ \*292 ] factor will thus render himself \*personally liable for the freight due upon the whole voyage.<sup>(b)</sup> So, if the consignee of a cargo of goods instructs his factor to sell them, but the owner of the ship refuses to deliver the goods to the factor without an undertaking on his part to pay the freight and demurrage, and he gives such undertaking accordingly, the delivery of the goods by the owner will, under such circumstances, be held to be a good consideration for the factor's promise, and he will therefore be personally liable thereon.<sup>(c)</sup> And in like manner, if the factor of a foreign merchant agrees with a person in this country, to whom his principal has made a consignment by way of sale, that the shipment shall be in conformity with the revenue laws of Great Britain, so that no impediment shall arise upon the importation of the goods, or that, in default thereof, the conse-

(t) See *Spittle v. Lavender*, 2 Brod. & Bing. 453, (6 E. C. L. R.)

(u) See *Leadbitter v. Farrow*, 5 M. & Sel. 345; *Sowerby v. Butcher*, 2 C. & M. 371. (\*)

(x) *Maber v. Massias*, 2 W. Bl. 1072.

(y) *Morris v. Stacey*, Holt, N. P. C. 153, (3 E. C. L. R.)

(z) *Lohmann v. Rougemont*, 8 Scott, 530.

(a) *Paul v. Birch*, 2 Atkins, 621, 622; *Molloy*, 496, § 9.

(b) *Kennedy v. Gouvêa*, 3 D. & R. 503, (16 E. C. L. R.)

(c) *Benson v. Hippus*, 4 Bing. 455, (15 E. C. L. R.)

quence shall rest with the seller, he himself will be personally responsible on such agreement.(d)

Again; if a bill-of-lading direct the delivery of goods "to A. or his assigns," or simply "to A., he or they paying freight for the same," and such bill-of-lading be indorsed by the consignor to his factor, and the latter take possession of the goods thereunder, he will be personally liable to the owner of the ship for the freight; because, although there was no original privity of contract between the owner and the factor for payment of such freight, still the taking of the goods from the ship by the latter under the bill-of-lading, is considered to be evidence of a new agreement by him,—as the ultimate appointee of the shipper for the purpose of delivery,—to pay the freight due for the carriage of such goods;(e) and so strictly is this rule adhered to, that [ \*293 ] if a factor be allowed to take \*possession of goods under such a bill-of-lading, without paying the freight, the owner will not be intitled, on the bankruptcy of the factor, to charge the principal therefor, unless he can prove that the latter authorized his factor to enter into a contract for the payment of the freight *in futuro*.(f) Nor, as it is said, can this rule operate as a hardship on factors, because they know the terms of the bill under which they claim, and the amount of freight which is due, and therefore, they need not make advances on the goods to an amount beyond their real value after deducting the sum payable on account of such freight.(g) Still however, although the factor be the indorsee of the bill-of-lading, yet if he do not get possession of the goods as such indorsee, but in some other way, he will not be liable for the freight; and accordingly, where a bill-of-lading was indorsed to a factor, but the goods were delivered to him, not by virtue of such indorsement, but under an order for their delivery from the consignee, he was held not to be responsible for the freight, because the giving of such order by the consignee imported that he continued to be the proprietor of the goods, and consequently, the name of the factor was never pledged, as that of the person to whom the owner was to look for the payment of the freight due in respect thereof.(h)

Nor will the factor be liable for the freight of goods which he receives under a bill-of-lading, on the face of which it appears that he acts as a mere agent for the consignor. Thus, where a cargo of goods was consigned from B. to L., and the captain of the vessel on board which they were shipped signed a bill-of-lading, whereby the goods were made deliverable "unto N. T. for the London Gas Company, or [ \*294 ] to \*his assigns, he or they paying freight;" and on the arrival of the vessel N. T. produced the bill-of-lading and received the goods under it; it was held, that he was not personally liable for the freight thereof; because, being on the face of the

(d) *Redhead v. Cator*, 1 Stark. 14, (2 E. C. L. R.)

(e) Per Lord Ellenborough, *Cook v. Taylor*, 13 East. 399. 403; and see *Bell v. Kymer*, 5 Taunt. 477, (1 E. C. L. R.); and *Dougal v. Kemble*, 3 Bing. 383, (13 E. C. L. R.); *Kentoria v. Ruding, Lloyd & Wells*. 274.

(f) *Tobin v. Crawford*, 9 M. & W. 716; (2) S. C. 5 M. & W. 235; (\*) and see per Parke, B., *ibid*. 241. (\*)

(g) Per Best, C. J., *Dougal v. Kemble*, 3 Bing. 389, (13 E. C. L. R.)

(h) *Wilson v. Kymer*, 1 M. & Sel. 157. 164. 166.

bill-of-lading a mere agent to receive the goods, it followed that the promise to be inferred from the receipt of the goods by him thereunder, was *primâ facie* a promise on his part, as agent for the consignees, to pay the freight on their account, and not a promise to be personally responsible therefor.(i)

A factor or broker is likewise personally liable to third parties whenever in his dealings with them,—although he contracts in the name of the principal,—he nevertheless knowingly exceeds his authority,(k) or fraudulently misrepresents the extent of that authority so as to induce them to deal with him,(l) or does an act which, although he believes it to be within the scope of his authority, yet in fact is not so.(m) These maxims, with the reasons on which they are founded, are stated and illustrated in the judgment of the Court of Exchequer in a recent case as follows. “The point, how far an agent is personally responsible who, having in fact no authority, professes to bind his principal, has on various occasions been discussed. There is no doubt that in the case of a fraudulent misrepresentation of his authority with an intention to deceive, the agent would be personally responsible. But independently of this, which is perfectly free from doubt, there seem to be still two other classes of cases in which an agent who, without actual authority, makes a contract in the name of his principal, is \*personally liable, even where no proof of such [ \*295 ] fraudulent intention can be given. First, where he has no [ \*295 ] authority and knows it, but nevertheless makes the contract as having such authority. In that case, on the plainest principles of justice, he is liable. For he induces the other party to enter into a contract on what amounts to a misrepresentation of a fact peculiarly within his own knowledge; and it is but just, that he who does so should be considered as holding himself out as one having competent authority to contract, and as guaranteeing the consequences arising from any want of such authority. But there is a third class in which the courts have held, that where the party making the contract as agent *bonâ fide* believes that such authority is vested in him, but has in fact no such authority, he is still personally liable. In these cases, it is true, the agent is not actuated by any fraudulent motives; nor has he made any statement which he knows to be untrue. But still his liability depends on the same principles as before. It is a wrong, differing only in degree but not in its essence from the former case, to state as true what the individual making such statement does not know to be true, even though he does not know it to be false, but believes, without sufficient grounds, that the statement will ultimately turn out to be correct; and if that wrong produces injury to a third party who is wholly ignorant of the grounds on which such belief of the supposed agent is founded, and who has relied on the correctness of his assertion, it is equally just that he who makes such assertion should be personally liable for its consequences.”(n)

(i) *Amos v. Temperley*, 8 M. & W. 798. 805.(\*)

(k) *East India Company v. Hensley*, 1 Esp. 111; 3 Chitty on Com. & Man. 212.

(l) See *Smout v. Ilberry*, 10 M. & W. 1. 9;(\*) and *Johnson v. Ogilby*, 3 P. Wms. 277.

279.

(m) *Polhill v. Walter*, 3 B. & Ad. 114, (23 E. C. L. R.); *Parrot v. Wells*, 2 Vern. 137.

(n) *Smout v. Ilberry*, 10 M. & W. 1. 9, 10.(\*)



From this then it would seem, that a factor or broker will not be liable to third parties on contracts in making which he has exceeded his authority, unless he has either been guilty of some fraud, or has made some statement with reference to the extent of his authority [ \*296 ] which he \*knew to be false, or has stated as the truth, with reference thereto, something which he did not know to be true,—omitting at the same time to give such information to the other contracting party as would have enabled him, equally with himself, to judge as to the authority under which he proposed to act. If therefore it be shown that, at the time of entering into the contract, he did no more than make a statement, according to the strict truth, of his belief that he had the requisite authority and that the principal would ratify his act, at the same time giving the other party to understand that he would not hold himself personally responsible in the event of such ratification being refused, there would not, as has been well observed, appear to be any legal ground upon which, in case of a non-ratification by the principal, the agent, thus acting *bonâ fide*, could be held personally liable.(o) And in like manner, if the factor or broker were to enter into a contract within the scope of his authority, but it were to appear that such contract had been entered into after his authority had in fact been revoked, but before he had notice of such revocation, he would not be held personally liable thereon; because in this case he had full authority, originally, to contract, and there is no ground for saying, that in representing his authority as continuing he did any wrong whatever. There was no *mala fides* on his part, no want of diligence in acquiring knowledge of the revocation, no omission to state any fact within his knowledge relating to it; and accordingly,—the true principle derivable from the cases being, that there must be some wrong or omission of right on the part of the agent, in order to make him personally liable on contracts made in the name of his principal, on the ground that he has exceeded his authority,—it follows, that in such a case as the above the factor or broker would not be responsible.(p).

[ \*297 ] \*Another liability which a factor or broker may incur to third parties, is that which arises where money has been paid to him for the use of his principal, to which the latter is afterwards discovered not to be intitled; and it is clear that, in cases of this description, the factor or broker will be liable to an action at the suit of the person from whom he received such money, as for money had and received to his use, unless he has, before action brought, actually paid the money over to his principal, or done something which is equivalent thereto.(q) “In general,” says Lord Mansfield, “the principle of law is clear, that if money be mispaid to an agent expressly for the use of his principal, and the agent has paid it over, he is not liable in an action by the person who has mispaid it.” but “if after the payment so made to him and before he has paid the money over to his principal, the person corrects the mistake, the agent

(o) *Smout v. Ilberry*, *supra*; and see per Lord Tenterden, *Polhill v. Walter*, 2 B. & Ad. 114. 124, (23 E. C. L. R.); and *Story's Com. on Agency*, § 265.

(p) See *Smout v. Ilberry*, *supra*.

(q) *Buller v. Harrison*, Cowp. 565; and per Lord Ellenborough, *Cox v. Prentice*, 3 M. & Sel. 344. 348.

cannot afterwards pay it over to his principal, without making himself liable to the real owner for the amount.”(r)

But the mere circumstance of the principal remitting bills-of-exchange or money to his factor or broker, with instructions to apply the same or their proceeds to the use of a third party, will not intitle such third party to sue the factor or broker as for money had and received to his use, because, as has been well observed, it is entire to the remitter to give and countermand his directions respecting the bills or money as often as he pleases, and the person to whom the same are remitted holds them for the use of the remitter himself, until by some engagement entered into by him with the person who is the object of the remittance, he has precluded himself from so doing, and has \*appropriated the remittance to the use of such person.(s) [ \*298 ] If however the factor or broker once enter into a binding engagement with the remittee, to hold the bills or money for his use, the latter may maintain an action against him;(t) and there are even cases in which the law will presume the existence of a sufficient privity of contract between the factor or broker and the remittee, to intitle the latter to maintain this action against the former, notwithstanding there may be no evidence of his having made any actual engagement to hold the property to his use. Thus, if the factor or broker be not only the agent of the person remitting the money or bills, but be likewise the general agent of the person for whose use they are remitted, this circumstance will of itself be sufficient to render him accountable to the latter for them;(u) and in like manner, if the factor or broker have acted as the agent of both parties in the particular transaction, and the one party remit money or bills to the factor or broker in the course of that transaction, for the use of the other, at the same time informing that other that he has done so, this will be sufficient of itself to intitle him to sue the factor or broker for the money or bills or their proceeds. Where therefore it appeared, that M. & Co. had, through the agency of A. & Co., procured B. to consign goods to them, and that M. & Co. had afterwards remitted bills to A. & Co. specifically appropriating them to pay B. for such goods, and had also written to B. advising him thereof;—it was held, that, as the original transaction had taken place through the agency of A. & Co., they must be regarded as the agents of both parties throughout the transaction, and that, accordingly, there was a sufficient privity between A. & Co. and B., to intitle him to recover the bills from them.(x)

\*Having thus considered the liabilities which factors [ \*299 ] and brokers may incur to third parties on contracts made with them in the course of their employment, let us now see by means of what defences they may limit their liability in the above mentioned cases.

From what has been already stated it appears, that where a factor

(r) *Buller v. Harrison*, supra. And see *Cary v. Webster*, 1 Stra. 480; *Sadler v. Evans*, 4 Burr. 1984.

(s) Per Lord Ellenborough, *Williams v. Everett*, 14 East, 582. 597; *Brind v. Hampshire*, 1 M. & W. 365; (\*) *Yates v. Bell*, 3 E. & Al. 643, (5 E. C. L. R.); *Grant v. Austen*, 3 Price, 58, (1 E. Ex. R.) (t) *Ibid.*

(u) See per Patteson, J., *Lilly v. Hays*, 5 Ad. & El. 548. 550, (31 E. C. L. R.)

(x) In *re Douglas*, 1 Mont. & Chit. 1.

or broker who conceals his principal, enters into any contract with a third party, such third party is at liberty to treat him as the actual principal, and to proceed against him accordingly; and this being the case, it would seem to follow, that wherever the factor or broker is sued upon such a contract, he may avail himself of any defence of which he could have availed himself, had he been in fact the principal in the transaction. Thus it is presumed, that if a factor or broker were sued for the price of goods sold, he might plead any right of set-off which he had against the vendor;(y) or that if he were sued for not accepting goods, he might avail himself of such defences as the following, for instance, that the bulk of the goods sold did not agree with the sample,(z) or that they did not correspond with the kind of goods mentioned in the contract, or satisfy a particular condition contained therein.(u) So it would appear, that if he were sued for not delivering goods, he might defend himself by showing that the vendee had been guilty of the breach of some condition precedent, whereby he was discharged from the performance of his contract;(b) or that, if he were sued as the acceptor or drawer or indorser of a bill-of-exchange, he might show that as between himself and the drawer in the one case, or as between himself and his immediate indorsee in the other, there had been no consideration for his \*promise,(c) [ \*300 ] or that the consideration was illegal,(d) or that for any other reason, such as the want of notice of dishonour, or the release of prior parties to the bill, or the giving time to such parties, he was discharged from his liability thereon. And in like manner it would seem, that if he were sued for freight he might take advantage of any of the usual defences, such as that the carriage of the goods had not been completely performed,(e) or that the master of the ship had refused to forward the goods to their destination,(f) or that the owner was only entitled to recover freight *pro rata* on the voyage in question.(g)

Again; it appears to be now well settled, that where an insurance-broker who has a right to sue on a policy and who has likewise a lien on such policy, is sued by the underwriter or his assignees for premiums, he may set off in that action any sum which he could have recovered from the underwriter or proved against his estate on the policy in question, on account of a loss which has happened thereon; and this, whether such policy was effected by him on his own account or not, or whether he has, in the particular transaction, acted under [ \*301 ] the ordinary commission, or under a commission *del credere*.(h) But if the policy \*under which the loss sought

(y) Story's Com. on Agency, § 411.

(z) Hibbert v. Shee, 1 Camp. 113.

(u) Tye v. Finmore, 3 Camp. 113; Grounsell v. Lamb, 1 M. & W. 352.(\*)

(b) Chitty on Contracts, 570—575.

(c) Chitty on Bills, 91, 5th edit.

(d) Bailey on Bills, 410, 4th edit.

(e) Mashiter v. Buller, 1 Camp. 84.

(f) Hunter v. Prinsep, 10 East, 378; Osgood v. Groning, 2 Camp. 466.

(g) For a summary of the cases in which freight *pro rata* only is earned, see 3 Chitty

on Com. & Man. 413—416.

(h) Per Best, C. J., Davies v. Wilkinson, 4 Bing. 573. 575, (15 E. C. L. R.); Parker v. Beasley, 2 M. & Sel. 423; Koester v. Eason, *ibid.* 112; Grove v. Dubois, 1 T. R. 112; Bize v. Dickason, *ibid.* 285. If the marginal note to the case of Baker v. Langhorn, 6 Taunt. 519, (1 E. C. L. R.), were to be followed, that case would seem to militate against the doctrine stated in the text. The marginal note is as follows; "Seemle, that an insurance broker cannot set off against premiums due to the assignees of a bankrupt on policies underwritten by the bankrupt, losses which occurred before the bankruptcy, though the

to be set off is claimed, was effected in the name of the principal and not in that of the broker, the latter will not be intitled to set off the amount of such loss in an action brought against him by the underwriter or his assignees for premiums, even although he may have guaranteed the payment of the loss to his principal under a commission *del credere* ;(i) nor will the fact of the broker having a lien on the policy, or having actually paid the amount of the loss to his principal, intitle him to a set-off in such a case; because the policy being effected in the name of his principal, the broker could not sue thereon except in his name, nor, consequently, could he, on a plea of set-off, prove a debt due to himself thereunder; and thus, there being a want of mutuality of debts or credit between him and the underwriters, the set-off could not be supported.(k)

It appears further, that where the underwriter sues the broker for premiums, the latter will be permitted to set off in that action any sums which may be due from the former to his principal for returns of premium, provided the events which intitled his principal to such returns actually took place before action brought. Nor does the broker's right in this respect appear to depend on his being personally interested in the policy in respect of which the returns are [ \*302 ] \*claimed,—it being sufficient for this purpose, that the policy has been allowed to remain in his hands in order to enable him to adjust and receive such returns.(l) The reason of this rule seems to be;—that the broker not only receives the premiums from the assured as the agent of the underwriter, but that, until the latter calls upon him to pay over those premiums to him, he is likewise his agent to pay to the assured any sums to which he (the assured) may meanwhile become intitled for returns out of those premiums; and hence it follows, that if the underwriter brings an action against the broker for premiums, and before action brought the latter have notice that events have happened which intitle the assured to returns of premium, he has a right, as such agent, to deduct those returns in that action, from the gross amount of premiums due from him to the underwriter.(m) But this rule does not apply to any case in which the broker is called upon to pay the premiums, not by the underwriter himself, but by his assignees after his bankruptcy,—unless, that is, the amount due for returns of premium has been actually adjusted between the broker and the underwriter before the bankruptcy of the latter;(n) because, by the bankruptcy of the under-

policy was effected in the broker's name as agent." But this doctrine does not seem to be warranted by the judgment of the court in that case. On the contrary they appear to have admitted, although reluctantly, that the established doctrine was that stated in the text; at the same time that they decided against its being applied to the case in question, because before the action was brought, an account of the premiums claimed had been exhibited to the defendant, which he had over and over again promised to pay, and because there had been no attempt to claim a set-off until a very late period in the transaction.

(i) *Cumming v. Forrester*, 1 M. & Sel. 494; and per Lord Ellenborough, *Koster v. Eason*, 2 M. & Sel. 112. 119.

(k) See per Lord Ellenborough, *Koster v. Eason*, *supra*; and *Peole v. Northcote*, 7 Taunt. 478, (2 E. C. L. R.)

(l) *Shoe v. Clarkson*, 12 East, 507.

(m) *Ibid.*; and see per Lord Ellenborough, *Parker v. Smith*, 16 East, 382. 386; and per Mansfield, C. J., *Minett v. Forrester*, 4 Taunt. 541. 544.

(n) See per Lord Ellenborough, *Parker v. Smith*, *supra*.

writer, the broker's authority to deduct returns of premium as his agent is revoked, and the assignees have therefore a right to call upon him to pay over the full amount of the premiums for the benefit of the bankrupt's estate.(o) Nor does it appear to make any difference in such a case, whether the returns of premiums became due before the underwriter's bankruptcy or after it.(p) The same rule holds [ \*303 ] where the broker is called upon to pay the premiums \*by the executor of the underwriter; because, by the death of the latter, the broker's authority to make returns of premium to the assured is revoked; and, consequently, he cannot set off those returns in an action brought against him for premiums, after that event has taken place.(q)

Where an action is brought by a third party against a factor or broker to recover money which has been paid to him by mistake for the use of his principal, it will be a good defence in him to show, that before he had notice of that fact he had paid the money over to his principal; but it will be no defence on the part of the agent to such an action, that he has merely passed the money in account with his principal, or made a rest in such account, unless he is likewise prepared to show, that he has given his principal fresh credit, or accepted new bills, or has bought goods from, or advanced money to him in consequence thereof.(r) Nor will even the actual payment of the money by the factor or broker to his principal be a good defence to such an action, unless he can prove that he received the same expressly for the use of his principal;(s) nor, if the factor or broker have received money from a third person under circumstances which, as between themselves, would give the former no title to retain it, will it be any defence to an action brought against him to recover back that money, that he has paid it over to his principal.(t)

And lastly; it appears that if a factor or broker be sued by a third party to recover money which has been paid to him by his principal for such third party's use, he may, at least in some cases, set up the same defence to that action as his principal could have done, had the [ \*304 ] action been brought \*against him. Where therefore an action for money had and received was brought by the holder of a bill-of-exchange against an agent who had received a sum of money from the acceptor to satisfy it, it was held, that any defence might be set up in that action, which would have been available had the action been brought against the acceptor himself. The plaintiff, it was said, made out his right to the money in the defendant's hands, through the medium of the bill-of-exchange, and the latter, by impeaching the plaintiff's title to the bill, showed that he had no cause of action against him, and that though he had the money in his hands, it was not for his use, but for the use of whoever might be legally intitled to the bill.(u) In like manner, it will be a good defence

(o) *Parker v. Smith and Minetti v. Forrester*, *supra*.

(p) *Minetti v. Forrester*, *supra*.

(q) *Houston v. Robertson*, 6 Taunt. 448, (1 E. C. L. R.)

(r) *Per Lord Mansfield, Buller v. Harrison*, Cowp. 565. 568.

(s) *See Snowden v. Davis*, 1 Taunt. 359.

(t) *See per Lord Kenyon, Miller v. Aris*, Sel. N. P. 89, 9th edit.

(u) *Per Lord Ellenborough, Redshaw v. Jackson*, 1 Camp. 372, 373.

on the part of the factor or broker in such an action to show, that his principal countermanded his instructions before the money was paid over, or before he had entered into any engagement with the holder of the bill to hold the remittance for his use.(x) But it will be no defence to an action brought against a factor or broker by a third person, to recover money remitted to him by the principal for his use, to show that at the time of the remittance the latter was indebted to the factor or broker in a sum equal to the amount of such remittance; because, where a principal remits money to his agent for the purpose of its being paid over to a third party, the agent is bound, either to fulfil his instructions by paying the money over, or else to return it to the remitter, and therefore, he cannot keep it for the purpose of discharging any debt due from the remitter to himself.(y)

2. Let us now see, in what cases a factor or broker will be liable to third persons for wrongs committed by him in the course of his agency.

\*The general rule on this subject is stated by Lord Chief Justice Holt to be as follows:—"A servant or deputy, [ \*305 ] *quatenus* such, cannot be charged for neglect, but the principal only shall be charged for it; but for a misfeasance an action will lie against a servant or deputy, but not *quatenus* a deputy or servant, but as a wrong-doer;(z) and from this it would seem to follow; that if a factor or broker, whilst acting in that capacity, be guilty of any misfeasance with reference to the property of third persons; or if he dispose of property which may happen to be in his hands, but to which his principal has no title; or if, in the course of his employment, he be guilty of any fraud or misrepresentation, he will be liable to third persons for all damages which they may sustain by reason of such his tortious act, whether such act have been done *bonâ fide* by command of his principal and for his benefit, or at the mere will and for the benefit of the factor or broker himself.(a) Thus, if a factor or broker, after the bankruptcy of his principal, sell goods or other property of his principal which may happen to be in his possession, and on which he has no lien for advances or otherwise, he will be liable to an action of trover at the suit of the assignees for the recovery of the same, whether at the time of the sale he was aware of the principal's bankruptcy or not.(b) So, if the principal purchase goods, after notice that an act of bankruptcy has been committed by the vendor, or after the date of a fiat in bankruptcy against him, and then consign those goods to his factor for sale, the latter, if he sell the goods, will be liable to an action of trover at the suit of the vendor's [ \*306 ] assignees, \*although, at the time of the sale, he was [ \*306 ] wholly ignorant of his principal's want of title.(c) So if the factor or broker receive a bill-of-exchange from his principal, with notice

(x) *Stewart v. Fry*, 7 Taunt. 339, (3 E. C. L. R.)

(y) *In re Douglas*, 1 Mont. & Chit. 1. 15.

(z) *Lane v. Cotton*, 12 Mod. 473. 488.

(a) See per *Lee, C. J.*, *Perkins v. Smith*, 1 Wils. 328; *S. C. Sayer*, 40; per *Lord Ellenborough*, *Stephens v. Elwall*, 4 M. & Sel. 259. 261; and per *Tindal, C. J.*, *Cranch v. White*, 1 Scott, 314. 318; see also *Parker v. Godin*, 3 Sfa. 813, 814; *Bul. N. P.* 47; 1 Chitty on Pl. 84; and 3 Chitty on Com. & Man. 214.

(b) See *Pearson v. Graham*, 6 Ad. & El. 899, (33 E. C. L. R.); *Stephens v. Elwall*, *supra*.

(c) *Story's Com. on Agency*, § 819; and see *stat. 3 & 3 Vict. c. 39, s. 1*.

that it was intrusted to the latter by a third person for the purpose of its being discounted, and he gets the bill discounted accordingly, but applies the proceeds thereof in payment of a debt due from the principal to himself, he will be liable to an action of trover at the suit of such third person, in order to recover possession of the bill.(c) And in like manner, if by command of his principal he detain property in his hands which is claimed by a third person, and it turn out that his principal has, in fact, no title to such property, he will be personally liable to the owner for all damages sustained by him by reason of his detention thereof.(d) But it is said that the mere fact of a sale of goods being made by a broker after a sale of the same goods by his principal, but without notice of such prior sale, will not render the broker liable to an action of trover at the suit of the person who purchased the goods from his principal;(e) nor will a reasonable and qualified refusal on the part of the factor or broker to deliver up property which was claimed by a third person, until he has had an opportunity of consulting his principal, subject him to an action of trover at the suit of that person, for the recovery thereof,—provided, at the time the claim was made, he had no notice that the principal [ \*307 ] \*had already been applied to, and had refused to give an order for the delivery of the property.(f) So a distinction might perhaps be made between cases in which the factor or broker sells goods for his principal after a secret act of bankruptcy by the latter, by virtue of his general authority merely; and cases in which he sells them by virtue of an express command from his principal with reference to those specific goods,—it being held to be very doubtful, whether, in the latter case, the agent could be said to have converted the goods as against the assignees of his principal;(g) and it is held, further, that if the assignees of a bankrupt claim goods which have been sold to the bankrupt by a factor or broker, but which have been allowed to remain in the hands of the latter, they can only take them subject to all the equitable rights attaching on the bankrupt with reference thereto. Where therefore it appeared that A., as factor for B., had sold goods then in his possession, to C., which were paid for by a bill drawn by C. and accepted by D.; that C. afterwards ordered A. to keep the goods in his hands and to sell them if he could make a certain profit; that before the bill became due D. failed; that in consequence thereof A. applied to C. for a further security, whereupon C. gave him an order to sell the goods and apply the proceeds in payment of the bill, and that B. subsequently ratified A.'s act; that C. afterwards, and before the goods were sold, became bankrupt; that the bill drawn on D. was dishonoured at maturity; and that the

(c) *Cranch v. White*, *supra*.

(d) See *Wilson v. Anderton*, 1 B. & Ad. 450, (20 E. C. L. R.) "The situation of the bailee," in such a case it is said, "is not one without remedy. He is not bound to ascertain who has the right; he may file a bill of interpleader in a court of equity. But a bailee who forbears to adopt that mode of proceeding, and makes himself a party by retaining the goods for the bailor must stand or fall by his title." Per Lord Tenterden, *ibid.* 456.

(e) Per Roll, J., *Alwyn v. Taylor*, Ayleyn's Select Ca. 93, 94, Mich. Term, 24 Car. 1, "The broker ought in such a case to make his sale conditionally—if the master hath not sold before." *Ibid.*

(f) See *Alexander v. Southey*, 5 B. & Al. 247, 248, (7 E. C. L. R.)

(g) Per Lord Denman, *Pearson v. Graham*, *supra*; and *Coles v. Rotins*, 3 Camp. 183.

assignees of C., having made a demand of the goods from A., brought trover for the same;—it was held, that they could not maintain that action, for that, after the order given by C. to A. to sell the goods and apply the proceeds in payment of the bill, they must be taken to have remained in his hands subject to that charge.(h)

\*Again; it is clear that if a factor or broker, who conceals [ \*308 ] his principal, be guilty of any fraud in the course of his employment, or of any breach of an express or implied warranty, or if he make any false representation whereby third persons are induced to deal with him, he will be liable as principal for all damages resulting therefrom, whether in committing such fraud, or making such representation or warranty, he acted by the command of the real principal or not;(i) and so, if the factor or broker be engaged in a trade in which there is a custom, to the effect that when a certain kind of goods sold therein have received a particular injury, that circumstance should be stated by the factor or broker at the time of the sale, the latter, if he omit to make such statement, will be taken to have warranted that the goods have not received the injury in question, and will be liable to the purchaser accordingly. Where therefore a broker had sold by auction a quantity of pimento which had been sea-damaged and repacked,—without, however, making any express warranty of soundness,—but it was proved that, when pimento which had been sea-damaged or repacked was offered for sale by auction, it was usual in the trade to state those facts at the time of the sale; and it was further proved, that no statement to that effect had been made at the sale in question, the broker was held to be liable as for a breach of warranty.(k) In like manner it would appear,—notwithstanding some cases to the contrary,—that if a factor or broker, as the mere agent of his principal, make any false affirmation to a third party with an intent to defraud him, and such third party suffer damages thereby, the factor or broker will be liable to him for the deceit;(l) and *a fortiori* will he be so liable, if in \*making such false affirmation, [ \*309 ] he have acted without the privity of his principal, or [ \*309 ] contrary to his express commands.(m) With reference to a mere servant, indeed, an opinion seems at one time to have been entertained, that it was only in this latter case that he was liable for a deceit of which he had been guilty in transacting the business of his master; for it was said, that where a servant in any case sells for his master, and by the command and covin of his master is even knowingly guilty of a deceit in conducting such sale, the master shall be liable and not the servant, because the sale is the sale of the master.(n) But the correctness of this doctrine appears to be doubted, even in regard to the case of a mere servant;(o) and judging as well from recent

(h) *Bailey v. Culverwell*, 8 B. & C. 448, (15 E. C. L. R.)

(i) See Com. Dig. Action upon the Case for a Deceit, A. 11; *Fitzh. N. B.* 98, K.; 1 Rol. 96, l. 15; *ib.* 90, F. l. 3; *ib.* 97, l. 5; *Medina v. Stoughton*, 1 Salk. 210.

(k) *Jones v. Bowden*, 4 Taunt. 847.

(l) See per *Tindal, C. J.*, *Pontifex v. Bignold*, 3 Scott, N. R. 390. 408; and see *Pasley v. Freeman*, 3 T. R. 51; *Haycroft v. Creasy*, 2 East, 92.

(m) Com. Dig. Action upon the Case for a Deceit, B.; 1 Roll. 95, l. 5.

(n) Com. Dig. *supra*; 1 Roll. 95, l. 10.

(o) *Story's Com. on Agency*, § 310; *Smith's Merc. Law* 125, (Law Lib.) note (o).



decisions,(p) as on principle, it would seem to be wholly inapplicable to the case of a factor or broker ; because, even where in effecting a sale he acts as a known agent, he has in general a beneficial interest in the subject-matter of the sale ; and therefore, although such sale be in fact the sale of the principal, so as to render him liable for the deceit of the factor or broker, still, to allow the latter, on this account, to derive his full share of benefit from such sale, notwithstanding its having been actually effected by means of his deceit, would manifestly be to controvert the well known maxim,—that no man shall be permitted to take advantage of his own wrong.

But it would appear that a factor or broker who, by the authority of his principal, appoints a sub-agent to assist in transacting the business of his principal, will not be liable to third persons for any tort which such sub-agent may commit in the course of his employment, unless it be shown \*that he actually ordered the [ \*310 ] latter to do those acts from which the damage has ensued ;(q) and the reason of this would seem to be, that the principal having empowered the factor or broker to appoint the sub-agent, such sub-agent is in contemplation of law, the agent of the principal and not of the factor or broker,—whence it follows, that the former and not the latter must answer to third persons for his acts.(r)

[ \*311 ]

## \*CHAPTER IV.

## ON THE DETERMINATION OF THE AUTHORITY OF FACTORS AND BROKERS.

HAVING thus traced the relationship which exists between a factor or broker and his principal, through all its several stages, and having likewise taken a review of the various rights and liabilities which, in the course of that relationship, these agents may acquire against or incur to third parties, it now remains for us, in the last place, to ascertain how this relationship may be determined, and the consequences with which its determination will be attended.

First then, as to the modes in which the authority of a factor or broker may be determined.

1. The first and most obvious mode by which this may be done, is manifestly by a countermand of the authority on the part of the principal ; for such authority having been given in the first instance at the will of the latter, and for his benefit, it follows that it can be exercised only so long as the person from whom it emanated, and for whose benefit it was conferred sees fit that it should be so exercised ; and accordingly it has been laid down as an undoubted rule,—that the agent's power may be countermanded at the mere will of the principal, and that this countermand may, in general, be effected at any time before the contract is completed.(a) Thus, the authority of

(p) See *Pontifex v. Bignold*, *supra*.

(q) See *Stone v. Cartwright*, 6 T. R. 411. 413.

(r) See per *Eyre, C. J.*, *Bush v. Steinman*, 1 Bos. & Pul. 404. 407.

(a) 3 Chitty on Com. & Man. 323.

an insurance broker \*may be revoked by his principal at any time before the underwriters have actually subscribed [ \*312 ] the policy, even although they may have previously signed the slip; (b) and in like manner, the principal may countermand the authority of his factor to sell goods, at any time before a memorandum of the contract of sale has been written and signed by the latter, pursuant to the statute of frauds; (c) but it appears, that in the case of a broker, neither party can recede from the contract after he has made an entry thereof in his book, even although the bought-and-sold-notes have not been delivered; because the entry made and signed by the broker is the only binding contract, and the bought-and-sold-notes are merely copies thereof. (d)

The above rule however is liable to some exceptions. Thus, it would seem that the principal cannot, in general, revoke the authority of his factor or broker, after that authority has been in part executed. (e) Accordingly we have seen, that if a factor or broker were instructed by his principal to pay money to a third party, and were, in pursuance of those instructions, to enter into a binding engagement with such third party to pay the money to him, his authority would cease to be revocable; (f) and so, if a factor, in consequence of having received instructions to purchase goods, were to enter into a contract with a third party for such purchase, the principal could not afterwards, of his own mere will, recal the authority by virtue of which the factor had so bound himself. (g) Indeed it may be stated \*as a general rule, that unless the authority given to the [ \*313 ] factor or broker be severable, so as to admit of the [ \*313 ] revocation of the unexecuted part without exposing him to damages by reason of his having executed it *pro tanto*, the principal will not be allowed to revoke that authority after such part execution, at least, not without fully indemnifying the factor or broker against the consequences thereof; (h) and it would appear, that in the case of a factor or broker living at a distance from his principal, his authority will cease to be revocable, provided he have done some act in pursuance thereof before receiving the letter containing such revocation, even although that letter was actually written before he had done the act in question. (i) Again; the authority of the factor or broker will be irrevocable, if it be coupled with an interest. (k) For instance, if a factor have the possession of goods on which he has a lien for previous advances, and the principal, in consideration that the former will forbear to sue him for such advances, authorizes him to sell the goods for less than the invoice prices, in order to repay himself, such authority will be irrevocable. (l) So if the principal consign goods to his factor for sale, in consideration of advances made by the latter on the security of those very goods, the authority in such a case will, it is presumed,

(b) *Warwick v. Slade*, 3 Camp. 127. (c) *Farmer v. Robinson*, 2 Camp. 339, note.

(d) *Per Lord Ellenborough, Heyman v. Neale*, 3 Camp. 337, 338.

(e) 2 Chitty on Com. & Man. 224; 1 Bell. Com. on Merc. Jur. § 413.

(f) *Brind v. Hampshire*, 1 M. & W. 365; (\*) *Williams v. Everett*, 14 East, 562.

(g) 2 Wils. and Shaw, House of Lords Rep. 599, note (1); and see *Ersk. Inst. B. 3, Tit. 3, § 40*. (h) *Story Com. on Agency*, § 466; and see *Ersk. Inst. supra*.

(i) See *Adams v. Lindsell*, 1 B. & Al. 681, 683.

(k) *Per Lord Ellenborough, Bristow v. Taylor*, 3 Stark. 50, 51, (3 E. C. L. R.)

(l) *Per Parke, B., Raleigh v. Atkinson*, 6 M. & W. 670, 676. (\*)

be irrevocable;(m) and indeed the same rule is said to be applicable to every case in which the power given to the factor or broker is necessary to effectuate any security.(n) If however a factor have a mere lien for previous advances, on goods which have been assigned to him for sale at a certain price, and the principal afterwards authorizes him to sell the goods at a less price, in order to repay [ \*314 ] \*himself, this authority, unless conferred for a valuable consideration, such as forbearance or the like, will still be revocable, and the principal will be intitled, within a reasonable time after notice to that effect, to redeem the goods on payment of the factor's claim.(o)

2. An equally obvious means whereby the authority of a factor or broker may be determined, is by the renunciation of the agency on the part of the latter himself; and this, it is said, may be done by him even after he has accepted, and in part executed his commission.(p) But wherever the agent renounces his agency, he would seem to be bound to give notice of that to his principal, and if he delay or neglect so to do, he will be liable for all damages which the latter may sustain by reason thereof.(q)

Again; the authority of the factor or broker is *ipso facto* determined by the completion of the purpose for which that authority was given.(r) Thus it is said, that if a man sell goods as a broker, the moment the sale is completed he is *functus officio*;(s) so, although the authority of a factor who acts for an undisclosed principal does not, as between his principal and third parties, cease with the completion of the contract, still there can be no doubt that as between the principal and the factor himself so soon as the contract is completed, his authority *quoad* that contract is at an end;(t) and in like manner we have seen, that even as between the principal and third parties, the authority of the factor to bind him by any matter collateral to the contract, for instance \*by a representation, exists only so long as the contract itself is in the course of formation, and no longer.(u) Further: the authority of the factor or broker may be determined by the efflux of time. Thus, if by the express terms of his commission it be limited to a certain period it will manifestly cease so soon as that period has expired;(x) and so, if there be a usage in the particular trade in which he is engaged, to the effect that an authority to buy or sell shall continue for a limited time only, the mere lapse of that time will operate as a revocation of the authority.(y)

4. The authority of a factor or broker will likewise be determined by the bankruptcy of his employer, so far, that is, as regards the doing by him of any act merely as the agent of the latter; and this rule depends upon a very obvious principle, namely,—that inasmuch as the principal himself is not competent, after his bankruptcy, to exercise any power over the subject-matter of the agency, he cannot authorize

(m) Ibid. and see *Gausson v. Morton*, 10 B. & C. 731, (21 E. C. L. R.)

(n) See per Lord Kenyon, *Walsh v. Whitcomb*, 2 Esp. 565, 566.

(o) *Raleigh v. Atkinson*, *supra*.

(p) *Ersk. Inst. B. 3, Tit. 3, § 40*; *Story Com. on Agency*, § 478.

(q) Ibid.

(r) 3 *Chitty on Com. & Man.* 223.

(s) Per Lord Ellenborough, *Blackburn v. Scholes*, 2 Camp. 341. 343.

(t) Ibid.

(u) Ante 89—91.

(x) *Story Com. on Agency*, § 480.

(y) *Dickinson v. Lilwall*, 4 Camp. 279.

another so to do, since this would be to allow the derivative authority to be stronger and more extensive than the original and principal authority, which, it is said, cannot be.(z) Accordingly a factor or broker will not be allowed to pay money as the agent of his principal after the bankruptcy of the latter;(a) nor to sell goods as such agent;(b) but if the factor have a lien on goods in his possession for advances, and have likewise authority to sell the same, he may exercise such authority by selling the goods and receiving the price, even after the bankruptcy of his principal;(c) because \*in this case he has an authority coupled with an interest, and consequen- [ \*316 ] ly, so far as that interest extends, he acts, not as the agent of his principal, but for the purpose of asserting a right which accrued to himself before the bankruptcy, and which, as we have seen, that event does not destroy.(d) In like manner, the bankruptcy of the factor or broker himself will operate as a revocation of his authority to do any act in his representative character, unless it be a merely formal act whereby no interest is passed.(e) Thus, if a factor sells goods and becomes bankrupt before he receives the price, his bankruptcy will operate as a countermand of his authority to receive such price on account of his principal.(f) But in this case also, as in that of the principal's bankruptcy, the factor, if he had a lien on the goods at the time of the sale, would be intitled, even after his bankruptcy, to receive the price thereof; because here he does not receive such price as the agent of his principal, but on his own account in respect of his lien.(g)

\*5. Again; the death of the principal will operate as a revocation of the authority of the factor or broker to do [ \*317 ] any act merely as the agent of the former, because, as has been well said; a valid act cannot be done in the name of a dead man.(h) But where the factor or broker has authority to do an act in his own name, there it would seem that the death of the principal will not *ipso*

(z) Per Lord Ellenborough, *Parker v. Smith*, 16 East, 382, 386.

(a) *Ibid.*, and see *Goldscmidt v. Lyon*, 4 Taunt. 534; and *Minett v. Forrester*, *ibid.* 541.

(b) See *Pearson v. Graham*, 6 Ad. & El. 899, (33 E. C. L. R.)

(c) Per Lord Ellenborough, *Alley v. Hosson*, 4 Camp. 325, 326; *Robson v. Kemp*, 4 Esp. 233.

(d) Ante, 207; and see *Copland v. Stein*, 8 T. R. 199; *Meyer v. Sharpe*, 5 Taunt. 74, (1 E. C. L. R.); *Nichols v. Clent*, 3 Price, 547, (1 E. Ex. R.)

(e) 3 Chitty on Com. & Man. 223; *Pothier, Trait. du Cont. de Mandat*, § 120, Oeuv. tom. 4, p. 269; par Dupin.

(f) Per Bayley and Holroyd, *Jr.*, *Hudson v. Granger*, 4 B. & Al. 27. 31. 33, (7 E. C. L. R.)

(g) *Ibid.* By statute 6 Geo. 4, c. 16, s. 2, factors and brokers are made liable to the bankruptcy laws, and the term "brokers" used in that section has been held to include, not only such brokers as are concerned in the purchase and sale of merchandize, but also stock-brokers, *Cullen*, 48; ship-brokers, *Pott v. Turner*, 6 Bing. 702, (19 E. C. L. R.); insurance-brokers, *Ex parte Stevens*, 4 Madd. 256; and bill-brokers, *Ex parte Phipps*, 2 Deac. 487; so that it would seem, that the effects of bankruptcy on factors and brokers considered merely as traders, will, in general, be the same as its effects on any other traders to whom the "bankrupt acts" apply. There is however one circumstance with reference to the effect produced by the bankruptcy of the factor, which deserves specific notice, namely,—that the property of his principal which is in his possession at the time of his bankruptcy, does not pass to his assignees; *Garret v. Cullum*, Bul. N. P. 42; *Ex parte Chion*, 3 P. Wms. 187, n.; *Godfrey v. Furzo*, *ibid.* 186; *Mace v. Caddell*, Cowp. 233; and in like manner, that where the principal transmits bills-of-exchange to his factor for sale, which the latter indorses and sells in his own name, the principal, and not the assignees, is intitled to the proceeds, in the event of the factor's bankruptcy, *Ex parte Pauli*, 3 Deac. 169.

(h) Per Lord Ellenborough, *Watson v. King*, 4 Camp. 272. 274; and see per Fortescue, *B. Shipman v. Thompson*, Willes, 105; and per Willes, C. J., *Wynne v. Thomas*, *ibid.* 563. 565.

*facto* determine such authority ;(i) and *a fortiori* will this be the case, if the authority conferred by the principal be coupled with an interest ; because in this latter instance, the factor or broker would seem to act on his own behalf, so far that is as his interest extends, and not merely as the agent of his principal.(k) In like manner the authority of a factor or broker will be determined by his death, and his personal representatives will not be intitled to take any steps therein ;(l) because this event not only puts it out of his power to execute the authority either in his own name or in that of his principal ; but likewise, because the commission is supposed to have been given in the first instance on the ground of the principal's special confidence in the factor or broker, and this confidence cannot be presumed to extend to his representatives as well as to himself.(m) So, it is said, that the [ \*318 ] \*death of one of two or more joint agents will determine the agency as to the rest ;(n) but perhaps this rule would be relaxed for the convenience of commerce, so as, in the case of the death of one of two or more joint factors or brokers to admit of a valid execution of the authority by the survivor or survivors.(o)

Such then are the circumstances under which the authority of a factor or broker may be determined, and such the events whereby that determination may be effected. With regard however to the events above enumerated, it is necessary to remark further, that the mere happening of those events will not in each case operate *per se* as a complete revocation of the factor's or broker's authority ; but that, on the contrary, there are some of them which will not have this effect, until notice of the same has been communicated both to the factor himself, and to those with whom he deals. Thus, if the principal by his own act countermand [ \*319 ] \*the authority of his factor or broker, such countermand will not take effect as to the agent himself until it is made known to him, nor will it take

(i) See *Smout v. Ilberry*, 10 M. & W. 1, 11.(\*)

(k) See *Shipman v. Thompson*, *supra* ; *Hammonds v. Barclay*, 2 East, 227, 245 ; *Story*, *Com. on Agency*, § 489.

(l) 3 *Chitty on Com. & Man.* 223 ; *Pothier, Trait. du Cont. de Mandat*, § 101, *Oeuv. tom. 4*, pp. 260, 261.

(m) *Story Com. on Agency*, § 490 ; *Ersk. Inst. B. 3, Tit. 3, § 40*. Another mode whereby the authority of a factor or broker may sometimes be determined, is by the marriage of a woman who, whilst sole, has conferred on him the authority in question ; for, as by marriage the property of the woman vests in her husband, it follows that she herself ceases to be able to dispose of it, and consequently any authority which she may have given to another to effect such disposition ceases likewise. *Story Com. on Agency*, § 481. This however is a case which does not frequently occur in connexion with those agents of whom we are now treating. As to the effect of the insanity of the principal on the authority of the factor or broker, the opinions of the most eminent jurists seem to be divided. Mr. Bell inclines to think, that unless that fact were established under a commission of lunacy, it would not have the effect of revoking the agent's authority, 1 *Com. on Merc. Jur.* 395, 396 ; and Mr. Chancellor Kent seems to be of the same opinion, 2 *Com. on Amer. Law*, 645 ; whilst, on the other hand, Dr. Story considers that "if a principal should become insane, that would operate as a suspension or revocation of the authority of his agent, during the continuance of the insanity ; for the party himself during his insanity could not do a valid act, and his agent cannot, in virtue of a derivative authority, do any act for and in the name of his principal, which he could not lawfully do by himself" *Com. on Agency*, § 481. This reasoning seems quite conclusive, and, judging from the other cases which we have considered in the text, the passage just cited would appear to contain the true doctrine with reference to the disputed question.

(n) *Pothier, Trait. du Cont. de Mandat*, § 102, *Oeuv. tom. 4*, p. 262 ; *Co. Litt.* 52, b. ; *Bac. Ab. Authority*, C.

(o) See *Godfrey v. Saunders*, 3 Wils. 73 ; *ante*, 50.

effect as to third persons, until it is made known to them.(n) And it is presumed that, in like manner, if the factor or broker renounce his agency, such renunciation on his part will not free him from liability either to his principal or to third parties, until notice thereof has been given to them. Again; it would appear that even the death of the principal will not, of itself, operate as a revocation of the authority of a factor to purchase goods in his own name on behalf of his principal,—at least, not so as to make the factor himself liable on the contract; but that in order to its having this effect, the factor must have had notice of his principal's death at the time he effected the purchase;(o) and indeed it is said, that a sale or purchase by the factor, without notice of the death of his principal, will not only not render him liable, but will in fact bind the representatives of the latter.(p) In like manner it is said, that if an insurance broker were authorized to procure a policy of insurance, and should execute his orders, but before the execution thereof the principal should, unknown to him, die, it would certainly deserve consideration, whether, in such a case, the policy would be void by the supposed revocation of the order by operation of law;(q) and so it is said, that the right of an insurance broker to receive losses which may happen on policies effected in his own name, is admitted, even although at the time such losses are paid, it may be known that the principal \*is dead.(r) In all these [ \*320 ] cases the governing maxims would seem to be, that the principal shall be bound to third parties by the act of his agent, because it is done under colour of an authority into the validity of which strangers cannot examine;(s) and that the agent himself shall not incur any liability by reason of his authority having, without his knowledge, been revoked; because, under such circumstances, he has been guilty of no such wrong or omission of right, as is held necessary in order to render any agent personally answerable on a contract, on the ground that, in making such contract, he has exceeded his authority.(t)

Lastly, as to the consequences of the determination of the factor's or broker's authority.

To these we have already had occasion, more than once, to advert, and we shall therefore content ourselves in this place with a brief recapitulation. Thus we have seen, that the principal will not be liable on any contract made by his factor or broker, after the authority of the latter has been completely revoked;(u) we have likewise seen, that the factor or broker himself will be liable on such contracts,(x) and further, that in some cases,—such as when his authority is revoked by the principal,—he may even become liable to an action founded in tort, if he dispose of the property of the latter after such revocation.(y) Again; we have seen that if the factor or broker renounce his com-

(n) See per Buller, J., *Salte v. Field*, 5 T. R. 211, 215; — *v. Harrison*, 12 Mod. 346; *Hazard v. Treadwell*, 1 Stra. 506; 3 Chit. on Com. & Man. 197. See also 1 Pothier on Obligations, by Evans, 335, § 474; and 1 Domat, b. 1, tit. 16, § 3, art. 9.

(o) See *Smout v. Ilberry*, 10 M. & W. 1, 9—11; (\*) 3 Chitty on Com. & Man. 223.

(p) *Story's Com. on Agency*, § 496.

(q) *Ibid.* § 497.

(r) *Ibid.*; and see 1 Pothier on Obligations, by Evans, 337, § 475, where it is stated, that if the death or change of situation were unknown to the debtor at the time of payment, his making such payment *bona fide* would be valid. See also Pothier, *Trait du Cont. de Mandat*, § 121, *Oeuv. tom. 4*, p. 269.

(s) 3 Chitty on Com. & Man. 223.

(t) *Smout v. Ilberry*, 10 M. & W. 1, 11.(\*)

(u) *Ante*, 79.

(x) *Ante*, 294.

(y) *Ante*, 365.

[ \*321 ] mission, he becomes bound to restore to his principal \*all property which has been intrusted to him by the latter thereunder ;(z) and lastly we may observe, that where the authority of the factor or broker himself is determined, that of any sub-agent appointed by him is likewise determined ; because, as the former cannot, after that event, do any act personally so as to bind his principal, so neither can the latter acting in his stead, inasmuch as the source of his authority has ceased to exist.(a) If however the sub-agent were appointed, in the first instance, with the express consent of the principal, it would perhaps be otherwise ; for, in such a case, his authority might be very properly regarded as emanating from the principal himself, and therefore, it would not necessarily be extinguished by the revocation or determination of that of the intermediate agent.(b)

(s) Ante, 276. (a) Pothier, *Trait. du Cont. de Mandat*, Oeuv. tom. 4, p. 265, § 112.

(b) Pothier, *Trait. du Cont. de Mandat*, Oeuv. tom. 4, p. 263, § 105.

# APPENDIX.

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## No. I.

### THE FACTORS' ACTS.

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4 GEO. 4, c. 83.

*An Act for the better Protection of the Property of Merchants and others, who may hereafter enter into Contracts or Agreements in relation to Goods, Wares, or Merchandizes intrusted to Factors or Agents.*  
[18th July, 1823.]

‘WHEREAS it has been found that the law, as it now stands, relating to goods shipped in the names of persons who are not the actual proprietors thereof, and to the deposit or pledge of goods, affords great facility to fraud, produces frequent litigation, and proves in its effects, highly injurious to the interests of commerce in general:’ be it therefore enacted by the king’s most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons in this present parliament assembled, and by the authority of the same, That from and after the passing of this act, any person or persons intrusted, for the purpose of sale, with any goods, wares, or merchandize, and by whom such goods, wares, or merchandize shall be shipped, in his, her, or their own name or names, or in whose name or names any goods, wares, or merchandize shall be shipped by any other person or persons, shall be deemed and taken to be the true owner or owners thereof, so far as to intitle the consignee or \*consignees of such goods, wares, and merchandize to [ \*324 ] a lien thereon, in respect of any money or negotiable security or securities advanced or given by such consignee or consignees to or for the use of the person or persons in whose name or names such goods, wares or merchandize shall be shipped, or in respect of any money or negotiable security or securities received by him, her, or them to the use of such consignee or consignees, in the like manner to all intents and purposes as if such person or persons was or were the true owner or owners of such goods, wares, and merchandize; provided such consignee or consignees shall not have notice, by the bill-of-lading for the delivery of such goods, wares, or merchandize or otherwise, at or before the time of any advance of such money or negotiable security, or of such receipt of money or negotiable security, in respect of which such lien is claimed, that such person or persons so



shipping in his, her, or their own name or names or in whose name or names any goods, wares, or merchandize shall be shipped by any person or persons, is or are not the actual and *bonâ fide* owner or owners, proprietor or proprietors of such goods, wares, and merchandize so shipped as aforesaid, any law, usage, or custom to the contrary thereof in any wise notwithstanding: provided also, that the person or persons in whose name or names any such goods, wares, or merchandize are so shipped as aforesaid, shall be taken for the purposes of this act to have been intrusted therewith, unless the contrary thereof shall appear or be shown in evidence by any person disputing such fact.

II. And be it further enacted, That it shall be lawful to and for any person or persons, body or bodies politic or corporate, to accept and take any goods, wares, or merchandize, or the bill or bills-of-lading for the delivery thereof, in deposit or pledge, from any consignee or consignees thereof; but then and in that case such person or persons, body or bodies politic or corporate, shall acquire no further or other right, title, [ \*325 ] or interest, in or upon or to the \*said goods, wares, or merchandize, or any bill-of-lading for the delivery thereof, than was possessed, or could or might have been enforced by the said consignee or consignees at the time of such deposit or pledge as a security as aforesaid; but such person or persons, body or bodies politic or corporate, shall and may acquire, possess and enforce such right, title, or interest as was possessed, and might have been enforced, by such consignee or consignees, at the time of such deposit or pledge as aforesaid; any rule of law, usage or custom to the contrary notwithstanding.

III. Provided always, That nothing herein contained shall be deemed, construed, or taken to deprive or prevent the true owner or owners, proprietor or proprietors of such goods, wares, or merchandize, from demanding and recovering the same from his, her, or their factor or factors, agent or agents, before the same shall have been so deposited or pledged, or from the assignee or assignees of such factor or factors, agent or agents, in the event of his, her, or their bankruptcy; nor to prevent any such owner or owners, proprietor or proprietors from demanding or recovering of and from any person or persons, or of or from the assignees of any person or persons in case of his or her bankruptcy, or of or from any body or bodies politic or corporate, such goods, wares, or merchandize, so consigned, deposited or pledged, upon repayment of the money, or on restoration of the negotiable security or securities, or on payment of a sum of money equal to the amount of such security or securities, for which money or negotiable security or securities such person or persons, his, her, or their assignee or assignees, or such body or bodies politic or corporate, may be entitled to any lien upon such goods, wares, or merchandize; nor to prevent the said owner or owners, proprietor or proprietors, from recovering of and from such person or persons, body or bodies politic or corporate, any balance or sum of money remaining in his, her or [ \*326 ] their hands, as the produce \*of the sale of such goods, wares, or merchandize, after deducting thereout the amount of the money or negotiable security or securities so advanced or given upon the security thereof as aforesaid: provided always, that in case of the bankruptcy of such factor or agent, the owner of the goods so

pledged and redeemed as aforesaid shall be held to have discharged *pro tanto* the debt due by him to the bankrupt's estate.

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6 GEO. 4, c. 94.

*An Act to alter and amend an Act for the better Protection of the Property of Merchants and others who may hereafter enter into Contracts or Agreements in relation to Goods, Wares, or Merchandize intrusted to Factors or Agents.* [5th July, 1825.]

‘WHEREAS an Act passed in the fourth year of the reign of his present majesty, intituled “An Act for the better Protection of the Property of Merchants and others who may hereafter enter into Contracts or Agreements in relation to Goods, Wares, or Merchandize intrusted to Factors or Agents:” and whereas it is expedient to alter and amend the said Act, and to make further provisions in relation to such contracts or agreements as hereinafter provided:’ be it therefore enacted by the king’s most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That from and after the passing of this act, any person or persons intrusted, for the purpose of consignment or of sale, with any goods, wares, or merchandize, and who shall have shipped such goods, wares, or merchandize in his, her, or their own name or names, and any person or persons in whose name or names any goods, wares, or merchandize shall be shipped by any other person or persons, shall be deemed and taken to be the true owner or owners \*there- [ \*327 ] of, so far as to intitle the consignee or consignees of such goods, wares, and merchandize to a lien thereon, in respect of any money or negotiable security or securities advanced or given by such consignee or consignees to or for the use of the person or persons in whose name or names such goods, wares, or merchandize shall be shipped, or in respect of any money or negotiable security or securities received by him, her, or them, to the use of such consignee or consignees, in the like manner to all intents and purposes as if such person or persons was or were the true owner or owners of such goods, wares, and merchandize: provided such consignee or consignees shall not have notice by the bill-of-lading for the delivery of such goods, wares, or merchandize or otherwise, at or before the time of any advance of such money or negotiable security, or of such receipt of money or negotiable security in respect of which such lien is claimed, that such person or persons so shipping in his, her, or their own name or names, or in whose name or names any goods, wares, or merchandize shall be shipped by any person or persons, is or are not the actual and *bonâ fide* owner or owners, proprietor or proprietors of such goods, wares, and merchandize so shipped as aforesaid, any law, usage, or custom to the contrary thereof in any wise notwithstanding: provided also, that the person or persons in whose name or names any such goods, wares, or merchandize are so shipped as aforesaid, shall be taken, for the purposes of this act, to have been intrusted therewith for the purpose of

consignment or of sale, unless the contrary thereof shall be made to appear by bill of discovery or otherwise, or be made to appear, or be shown in evidence by any person disputing such fact.

II. And be it further enacted, That from and after the first day of October one thousand eight hundred and twenty-six, any person or persons intrusted with and in possession of any bill-of-lading, India warrant, dock warrant, warehouse-keeper's certificate, wharfinger's [ \*328 ] certificate, warrant, or order for delivery of \*goods, shall be deemed and taken to be the true owner or owners of the goods, wares, and merchandize described and mentioned in the said several documents hereinbefore stated respectively, or either of them, so far as to give validity to any contract or agreement thereafter to be made or entered into by such person or persons so intrusted and in possession as aforesaid, with any person or persons, body or bodies politic or corporate, for the sale or disposition of the said goods, wares, and merchandize, or any part thereof, or for the deposit or pledge thereof or any part thereof, as a security for any money or negotiable instrument or instruments advanced or given by such person or persons, body or bodies politic or corporate, upon the faith of such several documents or either of them : provided such person or persons, body or bodies politic or corporate, shall not have notice by such documents or either of them or otherwise, that such person or persons so intrusted as aforesaid is or are not the actual and *bonâ fide*, owner or owners, proprietor or proprietors of such goods, wares, or merchandize so sold or deposited or pledged as aforesaid; any law, usage, or custom to the contrary thereof in any wise notwithstanding.

III. Provided always, and be it further enacted, That in case any person or persons, body or bodies politic or corporate, shall, after the passing of this act, accept and take any such goods, wares, or merchandize in deposit or pledge from any such person or persons so in possession and intrusted as aforesaid, without notice as aforesaid, as a security for any debt or demand due and owing from such person or persons so intrusted and in possession as aforesaid, to such person or persons, body or bodies politic or corporate, before the time of such deposit or pledge, then and in that case such person or persons, body or bodies politic or corporate, so accepting or taking such goods, wares, or merchandize in deposit or pledge, shall acquire no further or other right, title, or interest in or upon, or to the said goods, wares, [ \*329 ] or merchandize, or any such document \*as aforesaid, than was possessed or could or might have been enforced by the said person or persons so possessed and intrusted as aforesaid at the time of such deposit or pledge as a security as last aforesaid ; but such person or persons, body or bodies politic or corporate, so accepting or taking such goods, wares, or merchandize in deposit or pledge, shall and may acquire, possess and enforce such right, title or interest as was possessed and might have been enforced by such person or persons so possessed and intrusted as aforesaid; any rule of law, usage, or custom to the contrary notwithstanding.

IV. And be it further enacted, That from and after the first day of October one thousand eight hundred and twenty-six, it shall be lawful to and for any person or persons, body or bodies politic or corporate, to contract with any agent or agents, intrusted with any goods, wares,

or merchandize, or to whom the same may be consigned, for the purchase of any such goods, wares, and merchandize, and to receive the same of and pay for the same to such agent or agents; and such contract and payment shall be binding upon and good against the owner of such goods, wares, and merchandize notwithstanding such person or persons, body or bodies politic or corporate, shall have notice that the person or persons making and entering into such contract, or on whose behalf such contract is made or entered into, is an agent or agents: provided such contract and payment be made in the usual and ordinary course of business, and that such person or persons, body or bodies politic or corporate shall not, when such contract is entered into or payment made, have notice that such agent or agents is or are not authorized to sell the said goods, wares, and merchandize, or to receive the said purchase money.

V. And be it further enacted, That from and after the passing of this act, it shall be lawful to and for any person or persons, body or bodies politic or corporate, to accept and take any such goods, wares, or merchandize, or any such document as aforesaid, in [ \*330 ] \*deposit or pledge from any such factor or factors, agent or agents, notwithstanding such person or persons, body or bodies politic or corporate, shall have such notice as aforesaid, that the person or persons making such deposit or pledge is or are a factor or factors, agent or agents; but then and in that case such person or persons, body or bodies politic or corporate, shall acquire no further or other right, title, or interest in or upon or to the said goods, wares, or merchandize, or on any such document as aforesaid, for the delivery thereof, than was possessed or could or might have been enforced by the said factor or factors, agent or agents, at the time of such deposit or pledge as a security as last aforesaid; but such person or persons, body or bodies politic or corporate, shall and may acquire, possess and enforce such right, title, or interest as was possessed and might have been enforced by such factor or factors, agent or agents, at the time of such deposit or pledge as aforesaid; any rule of law, usage or custom to the contrary notwithstanding.

VI. Provided always, and be it enacted, That nothing herein contained shall be deemed, construed, or taken to deprive or prevent the true owner or owners, or proprietor or proprietors, of such goods, wares, or merchandize, from demanding and recovering the same from his, her, or their factor or factors, agent or agents, before the same shall have been so sold, deposited, or pledged, or from the assignee or assignees of such factor or factors, agent or agents, in the event of his, her, or their bankruptcy; nor to prevent such owner or owners, proprietor or proprietors, from demanding or recovering of and from any person or persons, body or bodies politic or corporate, the price or sum agreed to be paid for the purchase of such goods, wares, or merchandize, subject to any right of set-off on the part of such person or persons, body or bodies politic or corporate, against such factor or factors, agent or agents; nor to prevent such owner or owners, proprietor or proprietors, from demanding or recovering of and \*from such person or persons, body or bodies politic or corporate, such goods, wares, or merchandize so depo- [ \*331 ] sited or pledged, upon repayment of the money, or on restoration of

the negotiable instrument or instruments so advanced or given on the security of such goods, wares, or merchandize as aforesaid, by such person or persons, body or bodies politic or corporate, to such factor or factors, agent or agents; and upon payment of such further sum of money, or on restoration of such other negotiable instrument or instruments (if any) as may have been advanced or given by such factor or factors, agent or agents, to such owner or owners, proprietor or proprietors, or on payment of a sum of money equal to the amount of such instrument or instruments; nor to prevent the said owner or owners, proprietor or proprietors, from recovering of and from such person or persons, body or bodies politic or corporate, any balance or sum of money remaining in his, her, or their hands, as the produce of the sale of such goods, wares, or merchandize, after deducting thereout the amount of the money or negotiable instrument or instruments so advanced or given upon the security thereof as aforesaid: provided always, that in case of the bankruptcy of any such factor or agent, the owner or owners, proprietor or proprietors of the goods, wares, and merchandize so pledged and redeemed as aforesaid, shall be held to have discharged *pro tanto* the debt due by him, her, or them to the estate of such bankrupt.

VII. 'And whereas it is expedient to prevent the improper deposit ' or pledge of goods, wares, or merchandize, or the documents relating to such goods, wares, or merchandize, intrusted or consigned as ' aforesaid to factors or agents;' be it therefore enacted, That if any such factor or agent, at any time from and after the said first day of October one thousand eight hundred and twenty-six, shall deposit or pledge any goods, wares, or merchandize, intrusted or consigned as aforesaid to his or her care or management, or any of the said several [ \*332 ] documents \*so possessed or intrusted as aforesaid, with any person or persons, body or bodies politic or corporate, as a security for any money or negotiable instrument or instruments borrowed or received by such factor or agent, and shall apply or dispose thereof to his or her own use, in violation of good faith, and with intent to defraud the owner or owners of any such goods, wares, or merchandize, every person so offending, in any part of the United Kingdom, shall be deemed and taken to be guilty of a misdemeanor, and being convicted thereof according to law, shall be sentenced to transportation for any term not exceeding fourteen years, or to receive such other punishment as may by law be inflicted on persons guilty of a misdemeanor, and as the court before whom such offender may be tried and convicted shall adjudge.

VIII. Provided always, and be it further enacted, That nothing herein contained shall extend or be construed to extend to subject any person or persons to prosecution, for having deposited or pledged any goods, wares, or merchandize so intrusted or consigned to him, her, or them, provided the same shall not be made a security for or subject to the payment of any greater sum or sums of money than at the time of such deposit or pledge was justly due and owing to such person or persons from his, her, or their principal or principals: provided nevertheless, that the acceptance of bills-of-exchange by such person or persons drawn by or on account of such principal or principals, shall not be considered as constituting any part of such debt so due and

owing from such principal or principals within the true intent and meaning of this act, so as to excuse the consequence of such a deposit or pledge, unless such bills shall be paid when the same shall respectively become due.

IX. Provided also, and be it further enacted, That the penalty by this act annexed to the commission of any offence intended to be guarded against by this act, shall not extend or be construed to extend to \*any partner or partners, or other person or persons of [ \*333 ] or belonging to any partnership, society, or firm, except only such partner or partners, person or persons, as shall be accessory or privy to the commission of such offence; any thing herein contained to the contrary in any wise notwithstanding.

X. Provided also, and be it further enacted, That nothing in this act contained, nor any proceeding, conviction, or judgment to be had or taken thereupon, shall hinder, prevent, lessen or impeach any remedy at law or in equity, which any party or parties aggrieved by any offence against this act might or would have had or have been intitled to against any such offender if this act had not been made, nor any proceeding, conviction or judgment had been had or taken thereupon; but nevertheless, the conviction of any offender against this act shall not be received in evidence in any action at law or suit in equity against such offender: and further, that no person shall be liable to be convicted by any evidence whatever as an offender against this act, in respect of any act, matter, or thing done by him, if he shall at any time previously to his being indicted for such offence have disclosed any such matter or thing on oath under or in consequence of any compulsory process of any court of law or equity, in any action, suit, or proceeding, in or to which he shall have been a party, and which shall have been *bonâ fide* instituted by the party aggrieved by the act, matter, or thing which shall have been committed by such offender aforesaid.

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5 & 6 VICT. c. 39.

*An Act to amend the Law relating to Advances bonâ fide made to Agents intrusted with Goods.*

[30th June, 1842.]

‘ WHEREAS by an act passed in the sixth year of the reign of his late majesty King George the Fourth, \*intituled “An [ \*334 ] Act to alter and amend an Act for the better Protection of the Property of Merchants and others who may hereafter enter into Contracts or Agreements in relation to Goods, Wares, and Merchandize intrusted to Factors or Agents,” validity is given, under certain circumstances, to contracts or agreements made with persons intrusted with and in possession of the documents of title to goods and merchandize, and consignees making advances to persons abroad who are intrusted with any goods and merchandize are intitled, under certain circumstances, to a lien thereon, but under the said act and the present state of the law advances cannot safely be

‘ made upon goods or documents to persons known to have possession thereof as agents only : And whereas by the said act it is amongst other things further enacted, “ that it shall be lawful to and for any person to contract with any agent intrusted with any goods, or to whom the same may be consigned, for the purchase of any such goods, and to receive the same of and to pay for the same to such agent, and such contract and payment shall be binding upon and good against the owner of such goods, notwithstanding such person shall have notice that the person making such contract, or on whose behalf such contract is made, is an agent ; provided such contract or payment be made in the usual and ordinary course of business, and that such person shall not, when such contract is entered into or payment made, have notice that such agent is not authorized to sell the same, or to receive the said purchase-money :” And whereas advances on the security of goods and merchandize have become an usual and ordinary course of business, and it is expedient and necessary that reasonable and safe facilities should be afforded thereto, and that the same protection and validity should be extended to *bonâ fide* advances upon goods and merchandize as by the said recited act is given to sales, and that owners intrusting agents with the possession [ \*335 ] of goods and merchandize, or of documents of title thereto, should in all cases where such owners by the said recited act or otherwise would be bound by a contract or agreement of sale be in like manner bound by any contract or agreement of pledge or lien for any advances *bonâ fide* made on the security thereof : And whereas much litigation has arisen on the construction of the said recited act, and the same does not extend to protect exchanges of securities *bonâ fide* made, and so much uncertainty exists in respect thereof that it is expedient to alter and amend the same, and to extend the provisions thereof, and to put the law on a clear and certain basis :’ be it therefore enacted by the queen’s most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That from and after the passing of this act any agent who shall thereafter be intrusted with the possession of goods, or of the documents of title to goods, shall be deemed and taken to be owner of such goods and documents, so far as to give validity to any contract or agreement by way of pledge, lien, or security *bonâ fide* made by any person with such agent so intrusted as aforesaid, as well for any original loan, advance, or payment made upon the security of such goods or documents, as also for any further or continuing advance in respect thereof, and such contract or agreement shall be binding upon and good against the owner of such goods, and all other persons interested therein, notwithstanding the person claiming such pledge or lien may have had notice that the person with whom such contract or agreement is made is only an agent.

II. And be it enacted, That where any such contract or agreement for pledge, lien or security shall be made in consideration of the delivery or transfer to such agent of any other goods or merchandize, or document of title, or negotiable security, upon which the person so delivering up the same had at the time a valid and available

lien and security for \*or in respect of a previous advance [ \*336 ] by virtue of some contract or agreement made with such agent, such contract and agreement, if *bonâ fide* on the part of the person with whom the same may be made, shall be deemed to be a contract made in consideration of an advance within the true intent and meaning of this act, and shall be as valid and effectual, to all intents and purposes, and to the same extent, as if the consideration for the same had been a *bonâ fide* present advance of money: Provided always, that the lien acquired under such last-mentioned contract or agreement upon the goods or documents deposited in exchange shall not exceed the value at the time of the goods and merchandize which, or documents of title to which, or the negotiable security which shall be delivered up and exchanged.

III. Provided always, and be it enacted, That this act, and every matter and thing herein contained, shall be deemed and construed to give validity to such contracts and agreements only, and to protect only such loans, advances, and exchanges, as shall be made *bonâ fide*, and without notice that the agent making such contracts or agreements as aforesaid has not authority to make the same, or is acting *malâ fide* in respect thereof against the owner of such goods and merchandize; and nothing herein contained shall be construed to extend to or protect any lien or pledge for or in respect of any antecedent debt, owing from any agent to any person with or to whom such lien or pledge shall be given, nor to authorize any agent intrusted as aforesaid in deviating from any express orders or authority received from the owner; but that, for the purpose and to the intent of protecting all such *bonâ fide* loans, advances, and exchanges as aforesaid (though made with notice of such agent not being the owner, but without any notice of the agent's acting without authority,) and to no further or other intent or purpose, such contract or agreement as aforesaid shall \*be binding on the owner and all other persons interested [ \*337 ] in such goods.

IV. And be it enacted, That any bill of lading, India warrant, dock warrant, warehouse keeper's certificate, warrant, or order for the delivery of goods, or any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by indorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented, shall be deemed and taken to be a document of title within the meaning of this act; and any agent intrusted as aforesaid, and possessed of any such document of title, whether derived immediately from the owner of such goods, or obtained by reason of such agent's having been intrusted with the possession of the goods, or of any other document of title thereto, shall be deemed and taken to have been intrusted with the possession of the goods represented by such document of title as aforesaid, and all contracts pledging or giving a lien upon such document of title as aforesaid shall be deemed and taken to be respectively pledges of and liens upon the goods to which the same relates; and such agent shall be deemed to be possessed of such goods or documents, whether the same shall be in his actual custody, or shall be held by any other person subject to his control or for him or on

JUNE, 1845.—37



his behalf; and where any loan or advance shall be *bonâ fide* made to any agent intrusted with and in possession of any such goods or documents of title as aforesaid, on the faith of any contract or agreement in writing to consign, deposit, transfer, or deliver such goods or documents of title as aforesaid, and such goods or documents of title shall actually be received by the person making such loan or advance, without notice that such agent was not authorized to make such pledge or security, every such loan or advance shall be deemed and taken to be a loan or advance on the security of such goods or documents of title within the meaning of this act, \*though such goods [ \*338 ] or documents of title shall not actually be received by the person making such loan or advance till the period subsequent thereto; and any contract or agreement, whether made direct with such agent as aforesaid, or with any clerk or other person on his behalf, shall be deemed a contract or agreement with such agent; and any payment made, whether by money or bills of exchange, or other negotiable security, shall be deemed and taken to be an advance within the meaning of this act; and an agent in possession as aforesaid of such goods or documents shall be taken, for the purposes of this act, to have been intrusted therewith by the owner thereof, unless the contrary can be shown in evidence.

V. Provided always, and be it enacted, That nothing herein contained shall lessen, vary, alter, or affect the civil responsibility of an agent for any breach of duty or contract, or non-fulfilment of his orders or authority in respect of any such contract, agreement, lien, or pledge as aforesaid.

VI. Provided always, and be it enacted, That if any agent intrusted as aforesaid shall, contrary to or without the authority of his principal in that behalf, for his own benefit and in violation of good faith, make any consignment, deposit, transfer, or delivery of any goods or documents of title so intrusted to him as aforesaid, as and by way of a pledge, lien, or security; or shall, contrary to or without such authority, for his own benefit and in violation of good faith, accept any advance on the faith of any contract or agreement to consign, deposit, transfer, or deliver such goods or documents of title as aforesaid; every such agent shall be deemed guilty of a misdemeanor, and being convicted thereof, shall be sentenced to transportation for any term not exceeding fourteen years nor less than seven years, or to suffer such other punishment by fine or imprisonment, or by both, as the court shall award; and every clerk or other person who shall knowingly and wilfully act and assist in making any such consignment, \*deposit, transfer, or delivery, or in accepting or procuring such advance as aforesaid, shall be deemed guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the court, to any of the punishments which the court shall award, as hereinbefore last mentioned: Provided nevertheless, that no such agent shall be liable to any prosecution for consigning, depositing, transferring, or delivering any such goods or document of title, in case the same shall not be made a security for or subject to the payment of any greater sum of money than the amount which at the time of such consignment, deposit, transfer, or delivery was justly due and owing to such agent from his principal, together with the amount of

any bills of exchange drawn by or on account of such principal and accepted by such agent: Provided also, that the conviction of any such agent so convicted as aforesaid shall not be received in evidence in any action at law or suit in equity against him, and no agent intrusted as aforesaid shall be liable to be convicted by any evidence whatsoever in respect of any act done by him, if he shall at any time previously to his being indicted for such offence, have disclosed such act, on oath, in consequence of any compulsory process of any court of law or equity, in any action, suit, or proceeding which shall have been *bonâ fide* instituted by any party aggrieved, or if he shall have disclosed the same in any examination or deposition before any commission of bankrupt.

VII. Provided also, and be it enacted, That nothing herein contained shall prevent such owner as aforesaid from having the right to redeem such goods or documents of title pledged as aforesaid, at any time before such goods shall have been sold, upon the repayment of the amount of the lien thereon, or restoration of the securities in respect of which such lien may exist, and upon payment or satisfaction to such agent, if by him required, of any sum of money for or in respect of which such agent would by law be entitled to retain the same goods or documents, \*or any of them, by way of lien as [ \*340 ] against such owner, or to prevent the said owner from [ recovering of and from such person with whom any such goods or documents may have been pledged, or who shall have any such lien thereon as aforesaid, any balance or sum of money remaining in his hands as the produce of the sale of such goods, after deducting the amount of the lien of such person under such contract or agreement as aforesaid: Provided always, that in case of the bankruptcy of any such agent the owner of the goods which shall have been so redeemed by such owners as aforesaid shall, in respect of the sum paid by him on account of such agent for such redemption, be held to have paid such sum for the use of such agent before his bankruptcy, or in case the goods shall not be so redeemed the owner shall be deemed a creditor of such agent for the value of the goods so pledged at the time of the pledge, and shall, if he shall think fit, be entitled in either of such cases to prove for or set off the sum so paid, or the value of such goods, as the case may be.

VIII. And be it enacted, That in construing this act the word "person" shall be taken to designate a body corporate or company as well as an individual; and that the words in the singular number shall, when necessary to give effect to the intention of the said act, import also the plural; and *vice versâ*; and words used in the masculine gender shall, when required, be taken to apply to a female as well as a male.

IX. Provided also, and be it enacted, That nothing herein contained shall be construed to give validity to or in any wise to affect any contract, agreement, lien, pledge, or other act, matter, or thing made or done before the passing of this act.

## [ \*341 ]      \*APPENDIX, No. II.

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7 & 8 GEO. 4, c. 29, ss. 40. 51, 52.

*An Act for consolidating and amending the Laws in England relative to Larceny and other Offences connected therewith.*

[21st June, 1827.]

XLIX. And, for the punishment of embezzlements committed by agents intrusted with property, be it enacted, That if any money, or security for the payment of money, shall be intrusted to any banker, merchant, broker, attorney, or other agent, with any direction in writing to apply such money, or any part thereof, or the proceeds or any part of the proceeds of such security, for any purpose specified in such direction, and he shall, in violation of good faith, and contrary to the purpose so specified, in anywise convert to his own use or benefit such money, security, or proceeds, or any part thereof respectively, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years nor less than seven years, or to suffer such other punishment by fine or imprisonment, or by both, as the court shall award; and if any chattel or valuable security, or any power of attorney for the sale or transfer of any share or interest in any public stock or fund, whether of this kingdom, or of Great Britain or of Ireland, or of any foreign state, or in any fund of any body corporate, company, or society, shall be intrusted to any banker, merchant, broker, attorney, or other agent for safe custody, or for any special purpose, without any authority to sell, negotiate, transfer, or pledge, and he shall, in violation of good faith, and contrary to the object or purpose for which such chattel, security, or power of attorney shall have been intrusted to him, sell, negotiate, transfer, pledge, or in any manner convert to his own use or benefit such chattel or security, or the proceeds of the same, or any part thereof, or the share or interest in the stock or fund to which such power of attorney shall relate, or any part thereof, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the court, to any of the punishments which the court may award, as hereinbefore last mentioned.

LI. And be it enacted, That if any factor or agent intrusted, for the purpose of sale, with any goods or merchandize, or intrusted with any bill-of-lading, warehouse-keeper's or wharfinger's certificate, or warrant or order for delivery of goods or merchandize, shall, for his own benefit, and in violation of good faith, deposit or pledge any such goods or merchandize, or any of the said documents, as a security for any money or negotiable instrument borrowed or received by such factor or agent, at or before the time of making such deposit or pledge, or intended to be thereafter borrowed or received, every such offender shall be guilty of a misdemeanor, and, being convicted

thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years nor less than seven years, or to suffer such other punishment by fine or imprisonment, or by both, as the court shall award; but no such factor or agent shall be liable to any prosecution for depositing or pledging any such goods or merchandize, or any of the said documents, in case the same shall not be made a security for or subject to the payment of any greater sum of money than the amount which, at the time of such deposit or pledge, was justly due and owing to such factor or agent from his principal, together with the amount of any bill or bills of exchange, drawn \*by or on account of such principal, [ \*343 ] and accepted by such factor or agent.

LII. Provided always, and be it enacted, That nothing in this act contained, nor any proceeding, conviction, or judgment to be had or taken thereupon against any banker, merchant, broker, factor, attorney, or other agent as aforesaid, shall prevent, lessen, or impeach any remedy at law or in equity which any party aggrieved by any such offence might or would have had if this act had not been passed; but nevertheless the conviction of any such offender shall not be received in evidence in any action at law or suit in equity against him; and no banker, merchant, broker, factor, attorney, or other agent as aforesaid, shall be liable to be convicted by any evidence whatever as an offender against this act, in respect of any act done by him, if he shall at any time previously to his being indicted for such offence have disclosed such act, on oath, in consequence of any compulsory process of any court of law or equity in any action, suit, or proceeding which shall have been *bonâ fide* instituted by any party aggrieved, or if he shall have disclosed the same in any examination or deposition before any commissioners of bankrupt.

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\*APPENDIX, No. III.

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RULES, ORDERS, AND REGULATIONS,

Made, ordained, and established by the court of Lord Mayor and Aldermen of the city of London, on Tuesday, the 15th day of September, 1818, for the admission of Brokers within the city of London and liberties thereof, with restrictions and limitations for the honest and good behaviour of all persons admitted, or who shall hereafter be admitted by the said court, into the office and employment of a broker within the said city and liberties thereof.

1. That every person applying to be admitted into the office and employment of a broker shall produce and show, to the satisfaction of this court, a certificate of his having competent skill and knowledge in the particular trade or business wherein he seeks to be admitted and act as a broker, which certificate shall also recite the nature of

his former servitude, or otherwise the line of business he has been brought up in, and has lately used ; such certificate to be signed by respectable merchants and others, not fewer than six in number at the least, using and carrying on trade or merchandize.

2. That every person so applying to be admitted into the office and employment of a broker, shall, in his petition to this court for such admission, set forth the line of business which he intends as such broker to pursue, and shall establish to the satisfaction of this court that he is conversant with such line of business, and in the articles he intends to intermeddle with as such broker.

[ \*345 ] 3. That no certificate or recommendation of any \*person to be admitted a broker be signed by an alderman of this city.

4. That this court will from time to time limit the admission of brokers to such competent and sufficient number, as this court in their discretion shall deem meet and necessary.

5. That the order of this court, of the 23d day of June, 1708, viz., "That no person shall thereafter be licensed to exercise the employment of a broker who shall drive any other trade, and that all persons who have been already admitted brokers, and do use or exercise any trade or calling, shall forthwith leave off and relinquish such trade or calling, or otherwise the court will discharge him or them from the said office and employment of a broker," be for the future strictly enforced.

6. That no broker shall make out or take any bill of parcels in his own name, or receive or take any bill of parcels or invoice on account of his principal, made out in his the broker's name, nor shall demand, receive, or take, any larger sum of money than the amount of the usual brokerage or commission.

7. That in the event of any broker becoming bankrupt, making composition with his creditors, or taking the benefit of any insolvent act, his license to act as a broker shall forthwith cease and determine, and he shall not afterwards be permitted to exercise the office and employment of a broker, unless he shall be readmitted upon application to this court.

8. That every broker shall and do enter every bargain or contract he shall make in a book to be kept in his office or counting-house, and to be intituled, "The Broker's Book," on the day of making every such bargain or contract, with the Christian and surname at full length of both the buyer and seller, the quantity and quality of the articles sold or bought, and the price of the same, and the terms of credit agreed upon, and deliver a contract note to both buyer and seller, or either of them, upon being requested so to do, within twenty-  
[ \*346 ] four hours after such \*request respectively, containing therein a true copy of such entry.

9. That no broker shall take or receive double brokerage, that is to say, from both buyer and seller of the same article, but from the buyer or seller only, whichever it may happen to be that shall employ him, and that no broker be employed for both buyer and seller in the same transaction, except only in regard to purchases made by brokers at public sales, and then always in such cases that the said purchases be made *bonâ fide*, and that the name or names of the principal or prin-

cipals be entered in the Broker's Book immediately after the conclusion of the day's sale, or the space of twenty-four hours next after every such transaction.

10. That every broker shall keep by him an authentic copy of his admission, under the hand of the town clerk, and shall produce and show the same, and also the silver medal delivered to him at the time of his admission, for his authority and the satisfaction of all persons concerned to know the same, upon being required so to do by any such person or persons.

11. That the penalty of the bond given by the brokers be increased, and that each broker shall enter into such bond in the penalty of One Thousand Pounds, and find two sureties to be approved of by this court who shall also enter into bond in the penalty of Two Hundred and Fifty Pounds each, for the due and just execution by the broker of his said office and employment.

12. That a copy of the bond entered into by brokers, and the oath taken by them on their admission, be advertised, and otherwise made public.

13. That the names of all brokers admitted and discharged shall, as soon after the order for their admission or discharge as the same can be conveniently done, be fixed up in a conspicuous manner at the Royal Exchange, and otherwise made public, as this court shall from time to time deem necessary and order.

*\*The Bond above referred to.*

[ \*347 ]

WHEREAS the above bounden [mentioning the broker's name and description] is by the court of lord mayor and aldermen of the city of London allowed to be admitted and sworn a broker within the same city and liberties, to have, use, and exercise the said office and employment during the pleasure of the said court, and no longer: Now the condition of this obligation is such that if the said [broker's name] for and during such time as he shall and doth continue in the said office and employment, shall and do well and faithfully execute and perform the same without fraud, covin, or deceit, and shall, upon every contract, bargain or agreement by him made, declare and make known to such person or persons with whom such agreement is made, the name or names of his principal or principals, either buyer or seller, and shall keep a book or register intituled, *The Broker's Book*, and therein truly and fairly enter all such contracts, bargains, and agreements and the day of the making thereof, together with the Christian and surname at full length of both buyer and seller, and the quantity and quality of the articles sold or bought, and the price of the same, and the terms of credit agreed upon, and deliver a contract note to both buyer and seller, or either of them, upon being requested so to do, within twenty-four hours after such request respectively, containing therein a true copy of such entry, and shall, upon demand made by any or either of them to manifest and prove the truth and certainty of such contract and agreement, and for the satisfaction of all such as shall doubt whether he is a lawful and sworn broker or not, shall, upon request, produce a medal of silver with her majesty's arms engraven or stamped on one side, and the arms of the city with his name on the other, and

shall not directly or indirectly, by himself or any other, deal for himself or any other broker in the exchange or remittance of money, or in [ \*348 ] buying any tally or tallies, \*order or orders, bill or bills, share or shares, or interest in any joint-stock to be transferred or assigned to himself or any other broker, or to any other in trust for him or them, or in buying any goods, wares, or merchandizes to barter or sell again upon his own account, or for his own or any other broker's benefit or advantage, or make any gain or profit in buying or selling any goods over or above the usual brokerage; and shall and do discover and make known to the said court of lord mayor and aldermen in writing the names and places of abode of all and every person and persons that he shall know to use and exercise the said office or employment, not being thereunto duly authorized and empowered as aforesaid, within thirty days after his knowledge thereof, and shall not employ, or cause, or permit, or suffer any person or persons to be employed with, under, or for him, to act as a broker within the said city and liberties thereof, not being duly admitted as aforesaid; then this obligation to be void and of none effect, or else to be and remain in full force and virtue.

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